No. 80-195

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

METROMEDIA, INC.,

Appellant,

v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Respondents.

PACIFIC OUTDOOR ADVERTISING CO., INC.,

Appellant,

v.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Respondents.

ON APPEAL FROM THE SUPREME COURT OF CALIFORNIA

JURISDICTIONAL STATEMENT

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Questions Presented

1. May the City of San Diego, consistently with the First and Fourteenth Amendments to the United States Constitution, eliminate and totally prohibit all outdoor advertising within the City when, pursuant to stipulated facts, (a) outdoor advertising exists only in areas of San Diego zoned for commercial and industrial purposes; (b) outdoor advertising is a distinct means of communication and medium for the expression of ideas and a forum for the communication of messages to the public; and (c) outdoor advertising communicates valuable commercial, political and social information which many businesses, politicians and other persons rely upon because other forms of advertising are insufficient, inappropriate and prohibitively expensive?

2. May the police power of the City of San Diego be utilized, consistently with the Fourteenth Amendment to the United States Constitution, to eliminate and totally destroy the legitimate and lawful business of outdoor advertising which has been conducted within San Diego for over 60 years, in the absence of any factual demonstration that such destruction is required to serve the needs of public health, safety or welfare?

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IN THE

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October Term, 1980

METROMEDIA, INC.,

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v.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

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THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Respondents.

Opinions Below

The Memorandum of Intended Ruling of the Superior Court, County of San Diego, State of California and Order enjoining enforcement of San Diego Ordinance No. 10795 are unreported. Copies are contained in the Appendix commencing at 81a. The opinion of the Court of Appeal, Fourth Appellate District, was issued on February 11, 1977, was reported at 67 Cal. App. 3d 84, 136 Cal. Rptr. 453, and was vacated by the action of the California Supreme Court in granting a hearing. It is contained in the Appendix at 65a.

An opinion of the Supreme Court of California initially issued on March 21, 1979 was reported at 23 Cal. 3d 762, 592 P.2d 728, 154 Cal. Rptr. 212. A petition for rehearing was granted on May 23, 1979 (having the effect of vacating the March 21, 1979 opinion) and the opinion of the Supreme Court of California on rehearing was issued on April 14, 1980, as modified on denial of further rehearing on May 14, 1980. It is reported at 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 and is contained in the Appendix at 1a.

Jurisdiction

The subject of this case is the constitutionality of an ordinance adopted by the City of San Diego, California, which would totally eliminate and destroy the entire outdoor advertising industry within the city limits. In an opinion dated April 14, 1980, as modified on denial of rehearing on May 14, 1980 (A. 1a, 64a),* the Supreme Court of California held San Diego Municipal Ordinance No. 10795 (New Series) constitutional. A Notice of Appeal was filed on July 25, 1980, a copy of which is set forth at 102a of the Appendix.

Jurisdiction of this Court to review the final judgment of the Supreme Court of California is conferred by 28 U.S.C. § 1257(2) (1976).

Constitutional and Statutory Provisions

Relevant portions of the First and Fourteenth Amendments to the United States Constitution and the entirety of San Diego Municipal Ordinance No. 10795 (New Series) are set forth in the Appendix commencing at 104a.

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* References to "A. —" are to the appropriate pages of the appendix of this Jurisdictional Statement.

Statement of the Case

A. *The Stipulated Facts*

The parties—the City of San Diego and appellants—have stipulated to the basic facts which govern the disposition of this litigation.* Those facts may be summarized as follows:**

1. The City of San Diego

San Diego is the second most populous city in California (A. 120a, JS 3) and the center of government for a county containing one and one-half million people. (A. 120a, JS 4) The City covers 320 square miles (A. 120a, JS 5), larger than the combined sizes of Atlanta, Cleveland, Pittsburgh and Miami and over four times the size of the District of Columbia, *Rand McNally & Co., 1979 Commercial Atlas & Marketing Guide* 55-58 (110th ed. 1979).

San Diego is "multi-faceted, containing beaches, hills, residential areas, parks, a major seaport and naval base, a substantial commercial area, hundreds of miles of streets, highways and freeways, a large industrial area, a major

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* Under California law, both the parties and the courts are bound by the terms of the stipulation. *Greatorex* v. *Board of Administration*, 91 Cal. App. 3d 54, 58, 154 Cal. Rptr. 37, 39 (4th Dist. 1979); *Capital National Bank* v. *Smith*, 62 Cal. App. 2d 328, 343, 144 P.2d 665, 673 (3d Dist. 1944). This Court has, of course, frequently relied upon stipulations of fact. *See, e.g., Lewis* v. *BT Investment Managers, Inc.*, 100 S. Ct. 2009, 2014 (1980); *Andrus* v. *Utah*, 100 S. Ct. 1803, 1805 (1980); *Committee for Public Education and Religious Liberty* v. *Regan*, 100 S. Ct. 840, 848 n.5 (1980); *Mackey* v. *Montrym*, 443 U.S. 1, 9 (1979); *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U.S. 434, 436, 452 n.17 (1979).

** The Joint Stipulation of Facts is set forth at A. 119a as Appendix H to this Jurisdictional Statement. References to "A. —, JS —" are to the appropriate page of the Appendix and paragraph number of the Joint Stipulation. Quotations throughout the Statement of the Case are from the Joint Stipulation.

airport and numerous major industries." (A. 120a, JS 6) Its citizens find employment in all walks of life, from industry to retail sales to services. (A. 120a, JS 7) San Diego itself consists of the old and the new, the modern and the obsolete, the aesthetically attractive and the blighted. (A. 121a, JS 8)

"All of the signs owned by [appellants] in the City of San Diego are located at areas zoned for commercial and industrial purposes," areas comprising only 2.8% of the total City. (A. 123a, 121a, JS 20, 9)

2. The Business of Outdoor Advertising

Appellants are companies which have been legally engaged in the outdoor advertising business in San Diego for over 60 years. (A. 122a, 126a, JS 12, 15, 30) Appellants each own between 500 and 800 outdoor advertising displays in San Diego which are located on property leased to them for the purpose of erecting and maintaining such displays. (A. 122a, JS 13, 14) All such displays were legally erected at substantial expense, in full compliance with state and local laws. (A. 122a, JS 15, 16) While the values of individual displays vary, the range is between $2,500 and $25,000, each display having a remaining useful and substantial income-producing life in excess of 25 years. (A. 123a, 125a, JS 18, 19, 26)

Outdoor advertising signs differ in a variety of ways from on-site business signs. On-site signs advertise businesses, goods or services available on the premises. In contrast, outdoor advertising companies lease real property and erect signs thereon which are made available to national and local advertisers for commercial, political and social messages. "Outdoor advertising is different from on-site advertising in that:

> "(a) The outdoor advertising sign seldom advertises goods or services sold or made available on the premises on which the sign is located.

"(b) The outdoor advertising sign seldom advertises products or services sold or made available by the owner of the sign.

"(c) The outdoor advertising sign is, generally speaking, made available to 'all-comers', in a fashion similar to newspaper or broadcasting advertising. It is a forum for the communication of messages to the public.

"(d) The copy of the outdoor advertising sign changes, usually monthly. For example, a particular sign may advertise a local savings and loan association one month, a candidate for mayor the next month, the opening of the San Diego Zoo the third month, a new car the fourth month, and a union grievance the fifth month." (A. 123a-124a, JS 22)

3. The Nature of Outdoor Advertising

Outdoor advertising serves a wide range of social functions. As noted, "[i]t is a forum for the communication of messages to the public." (A. 123a-24a, JS 22(c)) It is, as well, "a means of communication and a media for the expression of ideas." (A. 123a, JS 21)

"Outdoor advertising is available for all forms of advertising messages. For example, it has been used in the City of San Diego to advertise national and local products, goods and services, new products being introduced to the consuming public, to publicize the 'City in motion' campaign of the City of San Diego, to communicate messages from candidates for municipal, state and national offices, including candidates for judicial office, to propose marriage, to seek employment, to encourage the use of seat belts, to denounce the United Nations, to seek support for Prisoners of War and Missing in Action, to promote the United Crusade and a variety of other charitable and socially-related endeavors

and to provide directions to the traveling public."* (A. 124a, JS 23)

Appellants' "outdoor advertising displays produce income to a variety of segments of the national, state and local economy and stimulate the flow of trade and commerce. Land owners and advertising agencies receive income from outdoor advertising." (A. 125a, JS 27)

"Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitally expensive." (A. 125a-26a, JS 28)

4. Ordinance No. 10795**

On March 14, 1972, the City Council of the City of San Diego adopted Municipal Ordinance No. 10795 (New Series). (A. 120a, JS 1) The ordinance prohibits all outdoor advertising throughout San Diego. It permits only on-site signs—*e.g.*, those which designate the owner or occupant or the premises upon which a sign is placed, identifying the premises or advertising goods manufactured or produced or services rendered on the premises upon

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* Photographs of outdoor advertising displays conveying various political, community service, and public interest messages such as were viewed by the San Diego public were set forth before the California Supreme Court in a brief, *amicus curiae*, of the Pacific Legal Foundation. A number of these examples are reproduced in Appendix I at 128a. The photographs are of actual displays used in California and illustrate the precise facts to which San Diego stipulated. Some are referred to in the dissenting opinion of Justice Clark. (A. 51a)

** The text of the ordinance is set forth in Appendix G at 104a-18a.

which a sign is placed.* (A. 107a) All other signs—*e.g.*, all outdoor advertising signs—are to be removed, without compensation and at the expense of the owners, over a four-year period. (A. 107a-11a, 126a-27a, JS 34) If enforced, the ordinance will "eliminate" the outdoor advertising business in San Diego. (A. 120a, JS 2)

B. *The Litigation*

In these litigations commenced by appellants Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc., and later consolidated by stipulation, an injunction was sought to enjoin enforcement of San Diego Municipal Ordinance No. 10795.

The decision of the Superior Court held the San Diego ordinance unconstitutional as an unreasonable exercise of San Diego's police power and an abridgement of appellants' First Amendment rights. (A. 81a-97a) Enforcement of the ordinance was permanently enjoined by the Superior Court. (A. 98a-101a)

The Court of Appeal, Fourth Appellate Department, unanimously affirmed, concluding that:

> "Here, we are not dealing with an ordinance which regulates or prohibits a few signs, or which affects only signs located in certain zones or areas of the City. Enforcement of the ordinance in question will require the removal of hundreds of signs having a conceded value in the millions of dollars. The facts before us indisputably show enforcement of the ordinance will bring about substantial private loss. While the stated purposes of the ordinance may be laudable, the City presents no convincing argument why the public bene-

* The ordinance contains a few partial exemptions for signs depicting premises for sale, rent or lease, depicting time, temperature or news, for bus bench and bus signs, and for temporary political campaign signs which are maintained for no longer than 90 days and are removed within 10 days after the election to which they pertain. (A. 111a-12a)

> fits sought cannot be achieved by more reasonable and less drastic measures. The stipulated facts simply do not support the proposition that all off-premise advertising signs within the City are public nuisances, or that it is reasonably necessary to remove all of them to promote safety, general economic interests, or even aesthetic values. The ordinance is too broad, too general and too inclusive. We have no doubt the enactment of the ordinance and its attempted enforcement is beyond the power of city officials and constitutes an unreasonable and arbitrary exercise of the police power." (A. 80a)

Given its conclusion that the ordinance constituted a constitutionally insupportable use of the police power, the Court of Appeal did not "consider whether the broad sweep of the ordinance also infringes upon First Amendment or Equal Protection rights or whether its amortization provisions meet constitutional standards." * (A. 80a)

The California Supreme Court reversed in an opinion joined in by four of its seven members. Rejecting the conclusion of both courts that had considered the case that San Diego had exceeded the constitutional scope of its police power, the Court concluded that the expressed purposes of "elimination of traffic hazards brought about by distracting advertising displays and the improvement of the appearance

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* Issues relating to Equal Protection and the constitutional adequacy of the amortization provisions were among a number raised by appellants at judicial levels prior to this Court. Other issues raised below included partial preemption under state law (an issue as to which the California Supreme Court, on rehearing, ruled in favor of appellants (A. 26a-39a)) and the failure of San Diego to comply with the California Environmental Quality Act. The only issues raised on this appeal are those relating to the First Amendment and police power rulings of the California Supreme Court—issues raised and pressed by appellants before all courts that have considered this litigation.

of the city" * (A. 6a-7a) were sufficient to sustain exercise of the police power.

The Court's treatment of the First Amendment issues raised by the case was ostensibly limited to the observation that the First Amendment contentions presented had, when the case was first argued before the California Supreme Court, "presented an arguable issue" but that this Court's dismissal of appeals in *Suffolk Outdoor Advertising Co.* v. *Hulse,* 43 N.Y.2d 483, 373 N.E.2d 263, 402 N.Y.S.2d 368 (1977), *appeal dismissed,* 439 U.S. 808 (1978) and other cases constituted a firm resolution by this Court "that a prohibition of off-site billboards does not violate the First Amendment." (A. 20a) The California ruling did not deal with or advert to the limited effect that this Court has often indicated that its summary dismissals are to be given** and

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* In reaching its conclusion as to aesthetic considerations, the Court was obliged to overrule one much-cited California case precisely to the contrary and to disapprove of language "contrary to the views expressed herein" in five others. (A. 18a, n.12)

** It has long been clear that while summary affirmances are dispositions on the merits, *Hicks* v. *Miranda,* 422 U.S. 332, 344 (1975), they are "not of the same precedential value as would be an opinion of this Court treating the question on the merits . . . ." *Edelman* v. *Jordan,* 415 U.S. 651, 671 (1974). *Illinois State Board of Elections* v. *Socialist Workers Party,* 440 U.S. 173, 180-81 (1979) ("summary affirmances have considerably less precedential value than an opinion on the merits."). "Indeed, upon fuller consideration of an issue under plenary review, the Court has not hesitated to discard a rule which a line of summary affirmances may appear to have established." *Fusari* v. *Steinberg,* 419 U.S. 379, 392 (1975) (Burger, C.J., concurring).

Inherently, a summary affirmance without opinion does not adequately discuss or explain the issues at hand. "[J]urisdictional statements . . . rarely contain more than brief discussions of the issues presented" and thus cannot serve as a basis for "a conclusive resolution of an important constitutional question. . . ." *Colorado Springs Amusements, Ltd.* v. *Rizzo,* 524 F.2d 571 (3d Cir. 1975), *cert. denied,* 428 U.S. 913, 916-17 (1976) (Brennan, J., dissenting). Summary affirmances lack "any substantive discussion" of the issues, *Edelman* v. *Jordan,* 415 U.S. 651, 670 (1974), and only affirm the judgment but not necessarily the reasoning

did not otherwise consider directly the First Amendment issues raised.

The majority opinion then concluded that the San Diego ordinance did not violate the California equivalent of the First Amendment in that it was an appropriate time, place and manner regulation. (A. 21a-22a) Distinguishing other means of communication which the California Supreme Court had itself held were protected by the First Amendment, the Court concluded that unlike all other means of communication, billboards constituted totally unprotected speech because they were "large, immobile and permanent." (A. 24a)

Justice Clark dissented, concluding that the statute "clearly prohibits expression of political, social and commercial thought." (A. 52a) His opinion pointed out that the majority had relied upon a number of cases decided prior to the rulings of this Court affording protection to commercial speech (A. 53a); that the majority had misread

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of the lower court, *Washington* v. *Confederated Bands and Tribes*, 439 U.S. 463, 477 n.20 (1979) (Summary affirmance "does not, as we have continued to stress . . . necessarily reflect our agreement with the opinion of the Court whose judgment is appealed. It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action."). Thus, this Court has often afforded plenary hearing to allow "full opportunity to consider the issue," *Tully* v. *Griffin, Inc.*, 429 U.S. 68, 75 (1976), "raised and decided" by a prior summary affirmance. *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 14 (1976).

Finally, summary affirmances have been narrowly interpreted to extend to only "the precise issues presented and necessarily decided," *Mandel* v. *Bradley*, 432 U.S. 173, 176 (1977), and "no more may be read into [the Court's] action than was essential to sustain that judgment." *Illinois State Board of Elections* v. *Socialist Workers Party*, 440 U.S. 173, 183 (1979). In the present case, the issue was by no means adequately presented to and necessarily decided by this Court in any prior ruling. This case, relating to a total ban on billboards in a major metropolitan area, differs significantly from all prior cases and thus raises a distinct and significant constitutional issue.

and misperceived the nature and effect of this Court's summary dismissal in *Suffolk* (A. 54a, n.1); and that the majority had improperly relied upon a number of entirely distinguishable cases involving billboards. (A. 55a)

Outdoor advertising, Justice Clark concluded, was entitled to the same First Amendment protection as other forms of expression. (A. 55a-58a) The majority opinion, Justice Clark argued, had failed to show that the governmental interests in aesthetics and traffic safety "outweigh[ed] First Amendment rights of plaintiffs, advertisers and the viewing public." (A. 58a) And, relying on the precise terms of the Joint Stipulation of Facts and on other materials, Justice Clark concluded that "[a]dequate alternative means of dissemination of speech are not available." (A. 60a)

Justice Richardson concurred in the judgment, sharing "some of the substantial doubts raised by the dissent of Justice Clark" (A. 48a) but believing himself bound by this Court's summary dismissal in *Suffolk*.

Justice Newman concurred, as well, but noted that he too "share[d] Justice Richardson's unease regarding the prohibition that Justice Clark finds illegal" (A. 48a) and was "not persuaded that this court should defer to city officials' views that one mode of communication in the city should be outlawed because it seems 'particularly unsightly and intrusive'." (A. 49a) However, and notwithstanding his view that "[t]he ordinance here ought to be redrafted" (A. 50a), Justice Newman joined the judgment.

The Questions Presented Are Substantial

Introduction

That the issues raised by this appeal are substantial is suggested, at the outset, by the nature of the disagreement amongst the members of the California Supreme Court itself. There is, to be sure, but one dissent, persuasive and powerful as we believe it is (A. 50a-63a); there are, as well,

two concurring opinions—one (A. 48a) which would join the dissent if freed of what it viewed as the constraint of this Court's dismissal of *Suffolk*, the other (A. 48a-50a) which, in fact, is in substantial ideological agreement with the dissent.

Nor is the division within the California Supreme Court atypical of that which has resulted in cases involving other —almost invariably lesser—bans on outdoor advertising throughout the nation.* The range of views as to the First Amendment issues in such cases is illustrated by comparison of the grudging treatment of First Amendment rights by the majority opinion in this case with the far more supportive view in cases such as *Oklahoma ex rel. Dep't of Transportation* v. *Pile*, 603 P.2d 337 (Okla. 1979), *cert. filed*, 48 U.S.L.W. 3699 (Feb. 11, 1980) and *Baldwin* v. *Redwood City*, 540 F.2d 1360 (9th Cir. 1976), *cert. denied*, 431 U.S. 913 (1977).

Similarly, the exercise of state or local police power to ban outdoor advertising has, as the majority opinion observed, sometimes been sustained. *See John Donnelly & Sons* v. *Mallar*, 453 F. Supp. 1272 (D. Me. 1978) *appeal docketed*, No. 79-1575 (1st Cir. Oct. 30, 1979); *Suffolk Outdoor Advertising Co.* v. *Hulse*, 43 N.Y.2d 483, 373 N.E.2d

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* This Court has itself previously come close to hearing cases involving bans on outdoor advertising. *See Lotze* v. *Washington*, 444 U.S. 921 (1979) (Justices White, Blackmun and Powell dissenting from dismissal of appeal); *Veterans of Foreign Wars* v. *City of Steamboat Springs*, 439 U.S. 809 (1978) (Justices Stewart, Blackmun and Powell dissenting from dismissal of appeal); *Modjeska Sign Studios, Inc.* v. *Berle*, 439 U.S. 809 (1978) (Justices Blackmun and Powell dissenting from dismissal of appeal); *Suffolk Outdoor Advertising Co.* v. *Hulse*, 439 U.S. 808 (1978) (Justices Blackmun and Powell dissenting from dismissal of appeal). Two cases are currently on the Court's docket raising similar or related issues. They are *Ackerley Communications, Inc.* v. *City of Seattle*, 92 Wash. 2d 905, 602 P.2d 1177 (1979) (*en banc*), *appeal pending*, 48 U.S.L.W. 3839 (June 16, 1980) and *Oklahoma ex rel. Dep't of Transportation* v. *Pile*, 603 P.2d 337 (Okla. 1979), *cert. filed*, 48 U.S.L.W. 3699 (Feb. 11, 1980).

263, 402 N.Y.S.2d 368 (1977), *appeal dismissed,* 439 U.S. 808 (1978); *Modjeska Sign Studios, Inc.* v. *Berle,* 43 N.Y.2d 468, 373 N.E.2d 255, 402 N.Y.S.2d 359 (1977), *appeal dismissed,* 439 U.S. 809 (1978); *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Board,* 369 Mass. 206, 339 N.E.2d 709 (1975); *Moore* v. *Ward,* 377 S.W.2d 881 (Ky. 1964).

But it has, as well, been frequently held improper in a wide range of states around the nation. *See City of Naples* v. *Polk,* 346 So. 2d 1076 (Fla. App. 2d Dist. 1977); *Combined Communications Corp.* v. *City and County of Denver,* 189 Colo. 462, 542 P.2d 79 (1975); *Metromedia, Inc.* v. *City of Des Plaines,* 26 Ill. App. 3d 942, 326 N.E.2d 59 (1st Dist. 1975); *Central Advertising Co.* v. *City of Ann Arbor,* 391 Mich. 533, 218 N.W.2d 27 (1974); *Norate Corp.* v. *Zoning Board of Adjustment,* 417 Pa. 397, 207 A.2d 890 (1965); *Stoner McCray System* v. *City of Des Moines,* 247 Iowa 1313, 78 N.W.2d 843 (1956); *Central Outdoor Advertising Co.* v. *Village of Evandale,* 54 Ohio Op. 354, 124 N.E.2d 189 (C.P. 1954).

Although the instant litigation is the latest in a series which has led to such inconsistent results, it comes to this Court in a unique factual context from those decisions previously litigated. As noted, this case is before the Court on a stipulated factual record which promotes, as no other case has, reasoned decision-making based on submissions agreed upon by the parties. Those stipulations conclusively determine significant issues of fact which were at issue in other litigations—that, for example, adequate alternative means of expression are not available for many because they are "insufficient, inappropriate and prohibitally expensive." (A. 125a-26a, JS 28)

The instant case does not relate to the constitutionality of limitations imposed upon the size or shape of outdoor advertising or the amount of such advertising to be permitted within particular geographic areas; nor does it relate to efforts to restrict outdoor advertising to specific areas or to preclude it from others of special scenic beauty,

historic character or rustic nature. Instead, the San Diego ordinance is a total ban on outdoor advertising in a significantly larger and more metropolitan area than any considered or determined previously by any appellate court. Of all the cases previously before this Court—or, we believe, likely to be presented—the prohibition imposed by the second most populous city in California (and ninth in the nation) is particularly appropriate for review.

I.

The Total Ban on the Medium of Outdoor Advertising Is Violative of the First Amendment.*

At issue on this appeal is the total "elimination", as the parties have stipulated, of "a means of communication and a media for the expression of ideas." (A. 120a, 123a, 126a, JS 2, 21, 29) The parties to the litigation are not alone

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* There is a suggestion in the majority opinion that appellants lack standing to assert that the San Diego ordinance is facially unconstitutional. (A. 23a, n.14) In fact, both the loss of their right freely to disseminate information and the resulting economic harm appellants will suffer as a result of the ordinance afford ample requisite "personal stake in the outcome of the controversy" to meet this Court's tests of standing. *Baker* v. *Carr*, 369 U.S. 186, 204 (1962). As was true of the book publisher in *Bantam Books, Inc.* v. *Sullivan*, 372 U.S. 58 (1963), who had to obtain a license for the distribution of certain books, appellants will suffer "a palpable injury as a result of the [respondent's] acts alleged to violate federal law . . . ." *Id.* at 64 n.6. And since appellants assert their own right to circulate information, *see Bantam Books, Inc.* v. *Sullivan, supra; Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938), the requirement that a petitioner "assert [its] own legal rights and interests," *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975), has also been amply met.

Moreover, when First Amendment rights of a distributor are intertwined with the rights of advertisers to disseminate information, or the public's right to receive it, this Court has permitted one party to argue on behalf of all whose rights are infringed by a statute. *See Bantam Books, Inc.* v. *Sullivan, supra; Lovell* v. *City of Griffin, supra; Stanley* v. *Georgia*, 394 U.S. 557, 564 (1969); *Martin* v. *City of Struthers*, 319 U.S. 141, 143 (1943).

in so characterizing outdoor advertising. Outdoor advertising has been recognized by the United States Congress as one of the nation's separate and distinct "communications media" in the Federal Campaign Communications Reform Act, 47 U.S.C. § 801(1) (repealed 1974). *See also* Federal Election Campaign Act of 1971, 2 U.S.C. §§ 431, 441(d) (1976).

Signs and billboards have, in fact, been an accepted means of communication for centuries. Ancient Egyptian obelisks, and even the famous Rosetta Stone carried advertising messages. AGNEW, OUTDOOR ADVERTISING, Chap. 2 (McGraw-Hill Book Co. 1938). The first poster printed in England in the 15th century advertised a religious law book and was posted on church doors. HOUCK, OUTDOOR ADVERTISING: HISTORY AND REGULATIONS, Chap. 2 (Univ. of Notre Dame Press 1969). Outdoor advertising, or the "poster" or "broadside", was an effective instrument of communication during the American and French Civil Wars. The medium has played a prominent role in American and European history. *See* DAVIDSON, PROPAGANDA AND THE AMERICAN REVOLUTION (Univ. of No. Carolina Press 1941); GALLO, THE POSTER IN HISTORY (American Heritage Publ. Co. 1972); HOUCK, *supra;* KLAUS, VISUAL ENVIRONMENT (Collier-McMillian Canada, Ltd. 1971). It plays one today in China as the availability of wallposters to express dissent varies in direct proportion to the degree of freedom granted the Chinese people. *Compare,* F. Butterfield, "Settling a Score with Mao," N.Y. Times, Dec. 10, 1978, § 6 (Magazine), at 44, 143 [re use of wallposters] *with* Los Angeles Times, March 24, 1979, at 1, col. 1 [re suppression of wallposters].

The banning of such a medium of communication is inconsistent with a wide range of rulings of this Court relating to other distinct forms of communication. Each form differs; but each has been held protected. When analyzing municipal restrictions on leafletting, for example,

this Court started from the presumption of its distinct value—precisely what, in fact, the parties have stipulated to in this action. In *Lovell* v. *City of Griffin*, 303 U.S. 444, 452 (1938), the consequence of protecting leafletting meant that the town of Griffin, Georgia could not even impose a conditional ban by requiring that an individual obtain a license prior to distribution. Again, in *Jamison* v. *Texas*, 318 U.S. 413 (1943), this Court first decided that constitutional protection extended to a medium—"the communication of ideas by handbills." *Id.* at 416. It then concluded that "the right to distribute handbills concerning religious subjects on the streets may not be prohibited at all times, at all places, and under all circumstances." *Id.* at 416.*

The same logic has guided the Court when other methods of distributing constitutionally protected information were threatened. In *Martin* v. *City of Struthers*, 319 U.S. 141 (1943), Justice Black isolated those factors which make door-to-door solicitation a medium—the fact that "[f]or centuries it has been a common practice"; "[t]he widespread use of this method of communication by many groups"; and its availability and importance to diverse individuals, from "the poorly financed causes" to the government, to convey a variety of ideas. *Id.* at 141, 145-46. Because of such qualities, the Court held that "stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas." *Id.* at 147.

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* *See also Hague* v. *Committee for Industrial Organization*, 307 U.S. 496, 518 (1939), in which the Court found an "ordinance absolutely prohibiting such distribution is void"; *Schneider* v. *State*, 308 U.S. 147 (1939), where faced with three ordinances that prohibited distribution and one that required a license prior to canvassing, the Court ruled that, "[a]lthough a municipality may enact regulations in the interest of the public safety, health, welfare or convenience, these may not abridge the individual liberties secured by the Constitution to those who wish to . . . circulate information or opinion." *Id.* at 160.

Again, in *Saia* v. *New York*, 334 U.S. 558 (1948), the Court enumerated the unique qualities of sound trucks as a medium—their importance and acceptance as a means of communication. The Court observed that:

> "Loud-speakers are today indispensable instruments of effective public speech. The sound truck has become an accepted method of political campaigning. It is the way people are reached." *Id.* at 561.

The Court then concluded:

> "Any abuses which loud-speakers create can be controlled by narrowly drawn statutes. When a city allows an official to ban them in his uncontrolled discretion, it sanctions a device for suppression of free communication of ideas." *Id.* at 562.

In one sense, these cases may be viewed as ones involving statutory overbreadth—one of many vices of the instant ordinance. Indeed, they may be read to conclude that the total "elimination" of any distinct medium of communication is, *a fortiori*, constitutionally overbroad. *See Village of Schaumburg* v. *Citizens for a Better Environment*, 100 S.Ct. 826, 835 (1980); *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205, 216-18 (1975); *Broadrick* v. *Oklahoma*, 413 U.S. 601, 612-13 (1973).

But they go farther. They are premised upon the notion that means of expressing ideas are not interchangeable. Since "words are often chosen as much for their emotive as their cognitive force," *Cohen* v. *California*, 403 U.S. 15, 26 (1971), this Court has guarded the speaker's choice of what he considers the most effective means for his communication. The speaker must have the opportunity to "reach the minds of willing listeners and to do so there must be an opportunity to win their attention," *Kovacs* v. *Cooper*, 336 U.S. 77, 87 (1949). And for each speaker, a

variety of factors, including financial constraints,* desired audience, and the message itself, combine to lead to the choice of a specific medium. In San Diego, this choice may lead police seeking higher pay to greet visitors with a billboard stating "Welcome to San Diego—Home of 1100 Underpaid Cops." (A. I) It may lead one group to propose by billboard a boycott of Shell (A. I), another to seek United States withdrawal from the United Nations (A. I). There are, to be sure, other ways to communicate. But they are not the same. For these speakers—and the multitude of commercial users of outdoor advertising—there is no adequate substitute.**

It is thus no answer to the constitutional protection afforded to each distinct medium to conclude, as did the majority opinion of the California Supreme Court, that

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* Outdoor advertising is the least expensive of the mass media for advertisers. For the year 1978, the average cost per rating point in San Diego for some of the media were as follows: for 30-second commercials on prime-time television, $65.00, and on spot television, $38.00; for 30-second commercials on spot radio, $28.00; for one page, black and white ads in weekly magazines, $83.00, and for four color ads in monthly magazines, $93.00; and for 600-line newspaper advertisements, $25.00. The average cost per rating point in San Diego for outdoor advertising for a standard, large scale showing for thirty days was, during the same time period, $6.00. "Cost per rating point" is a computation that relates costs to rating point levels—or a percentage indicating the proportion of a particular audience reached by a medium in a particular time frame—and is used by media planners as an indication of relative media efficiency. *Media Market Guide*, San Diego Market Section at 233 (Summer, 1978).

** Even those who are favored by the few exceptions in the ordinance receive only the most minimal benefits. The temporary political sign exception (A. 112a) is a useful example. Not only are those signs available only for candidates and propositions appearing on a ballot—thus barring expression of the entire remaining panoply of political views—but the "freedom" granted to candidates is that of spending $2500 to $25,000 to erect each sign structure (which must be torn down again immediately after the election).

some other medium may simply be substituted for the one at issue. In *Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977), the Court, dealing with a town ordinance that prohibited the posting of real estate "For Sale" and "Sold" signs, found that "serious questions exist as to whether the ordinance 'leave[s] open ample alternative channels for communication. . . .'" *Id.* at 93. The Court concluded:

> "[A]lthough in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than 'For Sale' signs; cf. *Martin* v. *City of Struthers*, 319 U.S. 141, 146 (1943); *Kovacs* v. *Cooper*, *supra*, at 102-103 (Black, J., dissenting); are less likely to reach persons not deliberately seeking sales information, cf. *United States* v. *O'Brien*, 391 U.S. 367, 388-389 (1968) (Harlan, J., concurring); and may be less effective media for communicating the message that is conveyed by a 'For Sale' sign in front of the house to be sold, cf. *Cohen* v. *California*, 403 U.S. 15, 25-26 (1971). The alternatives, then, are far from satisfactory." *Id.*

Nor is it any longer plausible to maintain—if it ever was—that outdoor advertising may be banned because of its significant commercial component. In this action, as Justice Clark's dissent observes, "the issue before us is not scope of permissible regulation of commercial thought." (A. 51a) In fact, the stipulation of the parties conclusively establishes that outdoor advertising in San Diego contains "valuable commercial, political and social information." (A. 125a-26a, JS 28) Any attempt to support the total "elimination" of outdoor advertising on the ground

that all such advertising is commercial is thus based on a conceded untruth.

Moreover, as this Court has recently made clear beyond peradventure, even totally commercial speech may not be suppressed unless:

> "[t]he limitation on expression [is] designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." *Central Hudson Gas & Electric Co.* v. *Public Service Commission,* 48 U.S.L.W. 4783, 4785 (June 20, 1980).

The Court further concluded that limitations on commercial speech may be "no more extensive than necessary to further the state interest," *id.* at 4787, and consequently held unconstitutional an order barring "all promotional advertising, regardless of the impact of the . . . service on overall energy use." *Id.* at 4786.

The language of the Court in *Central Hudson* is, in and of itself, totally inconsistent with the ruling below. Regulations that flatly ban *all* outdoor advertising can hardly survive a legal test which demands that regulation of even commercial speech be "no more extensive than necessary." If nothing else, the breadth of the San Diego statute is surely "excessive"—and thus unconstitutional.*

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* Even the case most strongly relied upon in this respect by the majority opinion supports precisely the opposite conclusion. *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976), is cited and relied upon for the proposition that "the city's interest in regulating commercial use of real property outweighed the incidental effect

Nor is it an answer to such constitutional considerations to urge, as does the majority opinion, that billboards are "intrusive" and thus lose the totality of their constitutional protection. (A. 22a) This Court's decision in *Erznoznik* v. *City of Jacksonville*, 422 U.S. 205 (1975), squarely refutes that conclusion. In *Erznoznik*, an ordinance prohibited a drive-in movie theater from exhibiting films containing nudity where the screen was visible from a public street or place. Notwithstanding that drive-in theater screens are "invariably huge" and "a unique type of eye-catching display that can be highly intrusive and distracting," 422 U.S. at 221, 222 (Burger, C.J., dissenting), and that the screen in question "dominated the view from public places including nearby residences and adjacent highways" and a church parking lot, *id.* at 207, 221, the Court rejected the notion of visual captivity in the street and placed on the individual street traveler the burden of avoiding an offending "encounter":

> "The plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' . . . Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit the government to decide which

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of the ordinance upon First Amendment values." (A. 24a-25a) The opinion totally overlooks the fact that *Young* involved simply a *spacing* regulation—precisely the form of regulation rejected by San Diego in favor of prohibition. The Court in *Young* expressly noted that the Detroit ordinances under consideration were "not challenged on the ground that they impose a limit on the number of adult theaters which may operate in the City of Detroit. There is no claim that distributors or exhibitors of adult films are denied access to the market. . . ." 427 U.S. at 62. *Young* thus flatly refutes the majority opinion's treatment of San Diego's ordinance since, as this Court observed, "[t]he situation would be quite different if the ordinance had the effect of suppressing, or greatly restricting access to, lawful speech." *Id.* at 71 n.35. That "quite different" situation is presented by this case.

> types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, absent the narrow circumstances described above, the burden normally falls upon the viewer to 'avoid further bombardment of [his] sensibilities simply by averting [his] eyes.'" 422 U.S. at 210-11 (footnote omitted).

See also Consolidated Edison Co. v. *Public Service Commission*, 48 U.S.L.W. 4776 (June 20, 1980); *Spence* v. *Washington*, 418 U.S. 405, 412 (1974); *Cohen* v. *California*, 403 U.S. 15, 21-23 (1971).

Finally, the reliance by the majority on time, place and manner analysis is simply unsound. To urge that a distinct medium may be destroyed by the simple invocation of the standard tripartite time, place and manner test—content neutral regulation in furtherance of significant governmental interests with alternative sources of communication available*—is to ignore the fact that virtually any medium could be eliminated by such a test. Most efforts to destroy an entire medium would be content neutral; arguably "significant" governmental interests abound; alternative sources may, by hypothesis, always be located in the remaining media—*e.g.*, those not "eliminated". If a state sought to prohibit sound trucks, it could be said that such abolition was content neutral, supported by the significant interests of avoiding noise and enhancing personal privacy, and that alternative sources of expression —such as leaflets or outdoor advertising—were available. If all leaflets were sought to be banned on one aesthetic theory or another, the presence of "other" means of communication could be cited. Precisely the same could be said in support of the banning of any medium of communication.

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* *See e.g., Police Department* v. *Mosley*, 408 U.S. 92 (1972).

Moreover, from the face of the San Diego ordinance and the terms of the stipulated facts of this case, even a time, place and manner analysis could not justify the ban at issue here. The parties have, after all, stipulated that there are *no* adequate alternative means of serving the "many businesses and politicians and other persons" whose needs are served only by outdoor advertising;* a review of Appendix I to this Jurisdictional Statement suggests precisely the same thing. The San Diego ordinance, furthermore, clearly discriminates on the basis of content since the ordinance exempts both on-site signs and signs relating to specified subjects—*e.g.*, premises for sale, rent or lease. As for the governmental interests asserted, the record of this case is utterly barren of *any* support for the proposition that traffic safety has been diminished by the existence of outdoor advertising. (*See infra*, pp. 25-26) As for aesthetic considerations (a matter dealt with more extensively at pp. 26-27, *infra*), we need say no more now than that at least as significant governmental concerns have been held insufficient to overcome First Amendment interests. *See, e.g., Linmark Associates, Inc.* v. *Township of Willingboro*, 431 U.S. 85 (1977). Indeed, if the mere assertion of necessarily subjective aesthetic considerations could overcome the First Amendment rights of a medium of communication, more than a few media would be imperiled. Sound trucks are noisy; leaflets litter; newsracks are sometimes unsightly; drive-in theaters showing nude figures may well be deemed unseemly. The First Amendment is not so easily overcome.

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* The effort of the California Supreme Court to transform the language of the stipulation that "many businesses and politicians and other persons" rely upon outdoor advertising because other media are "insufficient, inappropriate and prohibitively expensive" (A. 125a-26a, JS 28) to "[t]he *possibility* that the ordinance *may* impede an *occasional* advertiser from communicating his message" (A. 23a n.14; emphasis added) is suggestive of the cavalier fashion with which the binding terms of the stipulation were treated throughout the opinion. *See* A. 60a-61a (Opinion of Clark, J., dissenting).

II.

The Police Power of San Diego Cannot Constitutionally Be Utilized so as to Destroy the Outdoor Advertising Business in the Absence of Proof that Continuance of the Business in its Present Form Adversely Affects the Health, Safety, or Tangible Welfare of Other Persons or Property.

Under the decision of the California Supreme Court, a long-standing legitimate business will be "eliminated" across the entirety of San Diego's three hundred and twenty square miles. (A. 120a, 126a, JS 2, 5, 29, 30) As the parties have stipulated, prior to the enactment of Ordinance 10795, outdoor advertising had been conducted in full compliance with all applicable municipal and state laws (A. 122a, JS 15) at substantial cost to the plaintiffs. (A. 122a, 123a, JS 16, 18) All of appellants' billboard displays in San Diego are located in areas zoned for commercial and industrial uses (A. 123a, JS 20) and the displays are thus a critical link in the dissemination of goods and services within areas which San Diego has itself zoned for such purposes. Almost sixty per cent of San Diego's citizens are occupied in the manufacturing, retailing, and provision of services (A. 121a, JS 10) and San Diego has itself agreed that the outdoor advertising business provides both direct and indirect benefits to the flow of trade and commerce. (A. 125a-26a, JS 27, 28) In the face of this barrage of conceded benefits, on a record devoid of evidence of any real or substantial threat to public health, safety, or welfare, San Diego's attempt to abolish appellants' long-standing, legitimate, beneficial business based upon its police power violates the due process clause of the Fourteenth Amendment.

This Court's decisions establish that regulation of the use of property is permissible under the police power; but that some alleged regulatory authority under the police

power exceeds constitutional parameters. Determination of that issue is one of reasonableness, one requiring an assessment of two components—private loss and public gain. *Goldblatt* v. *Town of Hempstead,* 369 U.S. 590, 594 (1962).

Here, it is beyond question that the private loss appellants are asked by the City to suffer, as a cost of the destruction of their business, is enormous. Against a private loss which both parties have stipulated will range between $2,500,000 and $40,000,000 (A. 122a, 123a, JS 13, 18, 19) the constitutional question which is starkly posed is what justification, in the name of public health, safety, or welfare, can possibly be advanced by the City to make such a loss constitutionally "reasonable".

San Diego has advanced two justifications for the ordinance—traffic safety and aesthetics.* Of the first, it should suffice to say that while the opinion concludes, as a matter of law, that the ordinance reasonably relates to traffic safety, the record is precisely to the contrary: not a single motorist or pedestrian accident has ever been reported to the City of San Diego as being caused by the existence and maintenance of outdoor advertising signs. (Clerk's Transcript pp. 391-93) Indeed, counsel for the City of San Diego conceded that the "City was unaware of any particular person

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* The two are, in fact, difficult to reconcile. As the Oklahoma Supreme Court observed in *Oklahoma ex rel. Dep't of Transportation* v. *Pile,* 603 P.2d 337 (Okla. 1979), *cert. filed,* 48 U.S.L.W. 3699 (Feb. 11, 1980):

> "[T]he considerations of public safety and beauty as proffered by the state as a basis for prohibiting the speech signified by the defendant's billboard are mutually inconsistent. The argument is made that our residents are entitled to look at the beauty of the countryside, untrammeled by the blight of billboards, in the face of the statement that billboards can be banned because they constitute a distraction to the drivers of automobiles. Using this reasoning, one could argue the countryside should be covered with billboards to reduce the temptation to avert one's eyes from the road." *Id.* at 342-43.

or any particular instance, fact situation, of someone being injured in an automobile accident because of an outdoor advertising sign." * This is surely compelling evidence that, at least in the conceded absence of any factual basis to the contrary, it is far from "reasonable" to conclude that an entire and entirely legitimate business may be prohibited throughout an enormous metropolis.

Treatment of the traffic safety issue by the California Supreme Court is in marked contrast to that of this Court in *Erznoznik* v. *City of Jacksonville,* 422 U.S. 205 (1975). If the exposure of drivers to nude bodies on a drive-in theater screen is insufficient to justify a ban allegedly based upon the needs of traffic safety, it is difficult to comprehend how the far more placid medium of outdoor advertising may be totally prohibited.**

Reliance upon the simple invocation of "aesthetics" to justify the flat ban is no more constitutionally permissible. The "architecture and historic value" of New Orleans' Vieux Carre, may, of course, be preserved on aesthetic grounds, *City of New Orleans* v. *Impastato,* 198 La. 206, 211, 3 So.2d 559, 561 (1941); so may "an historic and literary shrine of singular interest" such as Concord, *General Outdoor Advertising Co.* v. *Department of Public Works,* 289 Mass. 149, 197, 193 N.E. 799, 821 (1935). To "ensure the natural beauty" of park areas, billboards have been held excludable. *Modjeska Sign Studios, Inc.* v. *Berle,* 43 N.Y.2d 468, 473, 373 N.E.2d 255, 257, 402 N.Y.S.2d 359, 362 (1977), *appeal dismissed,* 439 U.S. 809 (1978). But in each such situation the municipality had a clearly articulated, aesthetic goal which could *only* be maintained through a total prohibition of outdoor advertising. Such a rationale becomes simply an open-ended license to destroy

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* Reporter's Transcript of Proceedings, February 28, 1975, p. 18.

** In other contexts, as well, this Court has rejected speculative claims that other protected interests should be held to yield to the supposed requirements of traffic safety. *See, Raymond Motor Transportation, Inc.* v. *Rice,* 434 U.S. 429 (1978); *Delaware* v. *Prouse,* 446 U.S. 648 (1979).

when an aesthetic justification is proposed as the basis for a flat ban on the business of outdoor advertising in the commercially and industrially zoned sectors of the second most populous city in the single most populous state in this country.

The Ohio Supreme Court aptly described, 55 years ago, the necessarily subjective and differing results occasioned by legislating in areas of personal taste: "Certain Legislatures might consider that it was more important to cultivate a taste for jazz than for Beethoven, for posters than for Rembrandt, and for limericks than for Keats." *City of Youngstown* v. *Kahn Brothers Building Co.*, 112 Ohio St. 654, 661-62, 148 N.E. 842, 844 (1925).*

One may go farther. Every election brings with it changes in the individuals who hold legislative powers and presumably the collective "aesthetic judgments" of the legislature. Ordinance 10795 was itself passed by a five to four margin. There may, in the future, be other groups of five and four on other "aesthetic" issues. To say that the canvas may be scraped clean in every election is the antithesis of the "reasonableness" that is the governing standard in this area of law.

Appellants' displays were erected under city laws which authorized their construction. They were built exactly

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* A useful example may be seen by contrasting the final quotation of the majority opinion—the Ogden Nash doggerel (A. 47a)—with the conclusion of a leading international publication of graphic arts published in Switzerland which concluded as follows:

> "Ogden Nash thought that he would never see a billboard lovely as a tree, but he might have changed his mind if he could have seen what is happening now in California. Parallel to the rise of painted walls, an attempt is being made to turn the billboard into Big Art, a movement which recently won recognition when the California Museum of Science and Industry devoted an exhibition to it." *Graphics* (No. 199, V. 34, 1978-79) p. 448.

We do not, of course, suggest that the Court should hold that Nash was, as a matter of law, incorrect: aesthetic predilections are as personal as they are evanescent. But no notion of due process can permit the destruction of a 60 year old business on such a basis.

where and how the then-existing legislatures said they could be built. To conclude that San Diego may impose a flat ban on a decades-old legitimate business in such circumstances, at enormous cost and upon no showing by the City of any tangible benefit to the public health, welfare or safety of the citizens, is constitutionally impermissible.

Conclusion

The questions presented by this appeal are substantial. Probable jurisdiction should be noted and the case set down for argument.

Respectfully submitted,

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Appendices

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APPENDIX A

Opinion of the Supreme Court of California

SUPREME COURT OF CALIFORNIA

En Banc

Record No. 30782.

Metromedia, Inc.,

Plaintiff and Respondent,

v.

City of San Diego,

Defendant and Appellant.

Pacific Outdoor Advertising Company, Inc.,

Plaintiff and Respondent,

v.

City of San Diego, et al.,

Defendants and Appellants.

April 14, 1980.

As Modified on Denial of Rehearing

May 14, 1980.

Opinion by Justice Matthew O. Tobriner

The City of San Diego enacted an ordinance which bans all off-site advertising billboards and requires the removal of existing billboards following expiration of an amortization period. Plaintiffs, owners of billboards affected by the ordinance, sued to enjoin its enforcement. Upon motion for

summary judgment, the superior court adjudged the ordinance unconstitutional, and issued the injunction as prayed.

We reject the superior court's conclusion that the ordinance exceeded the city's authority under the police power. We hold that the achievement of the purposes recited in the ordinance—eliminating traffic hazards and improving the appearance of the city—represent proper objectives for the exercise of the city's police power, and that the present ordinance bears a reasonable relationship to those objectives. We reject also the lower court's alternative holding that the ordinance violates the First Amendment; judicial decisions demonstrate that a ban on commercial off-site billboards, enacted under the city's authority to regulate the commercial use of real property, does not abridge freedom of speech or press.

We agree with plaintiffs, however, that the San Diego ordinance is partially preempted by state law. By requiring uncompensated removal of billboards within 660 feet of federal interstate and primary highways, the ordinance endangers the state's share of federal highway funds; the ordinance thereby comes into conflict with provisions of the Outdoor Advertising Act (Bus. & Prof.Code, § 5200 et seq.) which require compensation when necessary to protect the state's receipt of federal monies. The ordinance's prohibition on construction of new billboards, and its provisions for uncompensated removal of billboards beyond the 660-foot limit, are not preempted by state law.

Plaintiffs also urge that we sustain the summary judgment on a variety of other grounds; they contend that it denies the equal protection of the law; that its amortization provisions are facially unreasonable; and that the city failed to comply with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.). For the reasons

we set forth, we conclude that none of these grounds will sustain the judgment below.

We conclude that the judgment of the superior court should be reversed and the case remanded to that court for further proceedings. At that time the court may determine which if any of plaintiffs' billboards fall within the preemptive scope of the Outdoor Advertising Act and render judgment that the ordinance may not be validly applied to require uncompensated removal of such billboards.

1. *Summary of proceedings in the trial court.*

The present case concerns the constitutionality of San Diego Ordinance No. 10795 (New Series), enacted March 14, 1972. With limited exceptions specified in the footnote,[1] the ordinance as subsequently amended prohibits all off-site "outdoor advertising display signs."[2] Off-site signs are

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[1] The original ordinance permitted the following off-site signs: Signs maintained in the discharge of a governmental function; bench advertising signs; commemorative plaques, religious symbols, holiday decorations and similar such signs; signs located within shopping malls not visible from any point on the boundary of the premises; signs designating premises for sale, rent or lease; public service signs depicting time, temperature or news; signs on vehicles conforming to city regulations; and temporary off-premises subdivision directional signs.

As originally enacted, the ordinance contained no exception for political signs. On October 19, 1977, the city council amended the ordinance to permit "Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after the election to which they pertain." (Ord. No. 12189 (New Series).) This amendment may have been prompted by the decision of the Ninth Circuit in *Baldwin* v. *Redwood City* (1976), 540 F.2d 1360, in which that court held an ordinance regulating temporary signs to be an unconstitutional restriction upon political speech.

[2] The ordinance does not define the term "outdoor advertising display signs." The history of the ordinance and the arguments

defined as those which do not identify a use, facility or service located on the premises or a product which is produced, sold or manufactured on the premises. All existing signs which do not conform to the requirements of the ordinance must be removed following expiration of an amortization period, ranging from 90 days to 4 years depending upon the location and depreciated value of the sign.

Plaintiffs, Metromedia, Inc., and Pacific Outdoor Advertising Co., Inc., are engaged in the outdoor advertising business and own a substantial number of off-site billboards

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of the parties demonstrate that the purpose of the ordinance is the prohibition of commercial billboards. But although the amended ordinance excludes signs which fall within 12 specific exceptions, it fails to exclude many varieties of less obtrusive, noncommercial signs that present no significant aesthetic blight or traffic hazard. That failure, in light of the absence of a definition of the class of signs prohibited, suggests a danger that the ordinance might be construed to apply to signs of a character very different from commercial billboards—for example, to a picket sign announcing a labor dispute or a small sign placed in one's front yard proclaiming a political or religious message.

To avert that danger, and to avoid the risk of unconstitutional overbreadth which a broad construction of the ordinance might entail, we adopt a narrow construction limiting its proscription to those signs which clearly fall within the intendment of the enactment. (Cf. *Welton* v. *City of Los Angeles* (1976) 18 Cal.3d 497, 506-507, 134 Cal.Rptr. 668, 556 P.2d 1119; *Braxton* v. *Municipal Court* (1973) 10 Cal.3d 138, 144-145, 109 Cal.Rptr. 897, 514 P.2d 697.) We find such a construction in the definition of the term "outdoor advertising display" in Revenue and Taxation Code section 18090.2: "a rigidly assembled sign, display, or device permanently affixed to the ground or permanently attached to a building or other inherently permanent structure constituting, or used for the display of, a commercial or other advertisement to the public." Although that specific definition was not before the San Diego City Council when it adopted Ordinance No. 10795, incorporation of that definition into the ordinance will fulfill the city's purpose of banning permanent structures used predominantly for commercial advertising, while avoiding the constitutional issues raised by a less certain or more expansive reading of the ordinance.

subject to removal under Ordinance No. 10795. Plaintiffs filed separate actions against the city, attacking the validity of the ordinance. The actions were consolidated by stipulation.[3] After extensive interrogatories and requests for admission had been answered all parties moved for summary judgment.

To facilitate the determination of the motion for summary judgment the parties entered into a stipulation of facts. The following portions of that stipulation are particularly pertinent to the present appeal: "2. If enforced as written Ordinance No. 10795 will eliminate the outdoor advertising business in the City of San Diego. . . . 13. Each of the plaintiffs are the owners of a substantial number of outdoor advertising displays (approximately 500 to 800) in the City of San Diego. . . . 17. The displays have varying values depending upon their size, nature and location. 18. Each of the displays has a fair market value as a part of an income-producing system of between $2,500 and $25,000. 19. Each display has a remaining useful income-producing life in excess of 25 years. 20. All of the signs owned by plaintiffs in the City of San Diego are located in areas zoned for commercial and industrial purposes. . . . 28. Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive. . . . 31. Many of plaintiffs' signs are within 660 feet and others are within 500 feet of interstate or federal primary high-

[3] Defendants in the consolidated action are the city, the members of the city counsel, and the city planning director.

ways. . . . 34. The amortization provisions of Ordinance No. 10795 have no reasonable relationship to the fair market value, useful life or income generated by the signs and were not designed to have such a relationship." [4]

The trial court filed a memorandum opinion stating that the ordinance was invalid as an unreasonable exercise of police power and an abridgment of First Amendment guaranties of freedom of speech and press. The court then entered judgment enjoining enforcement of the ordinance. The city appeals from that judgment.

2. *The summary judgment cannot be sustained on the ground that the San Diego ordinance exceeds the city's authority under the police power.*

The San Diego ordinance, as we shall explain, represents a proper application of municipal authority over zoning and land use for the purpose of promoting the public safety and welfare.[5] The ordinance recites the purposes for which it was enacted,[6] including the elimination of traffic

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[4] Plaintiffs filed no declaration to support the motion for summary judgment, but relied solely upon the pleadings, the city's response to interrogatories, and the agreed stipulation of facts.

[5] An ordinance restricting land use is valid under the police power if it has a real or substantial relation to the public health, safety, morals or general welfare. (*Associated Home Builders etc., Inc.* v. *City of Livermore* (1976) 18 Cal.3d 582, 604, 135 Cal.Rptr. 41, 557 P.2d 473; *Miller* v. *Board of Public Works* (1925) 195 Cal. 477, 490, 234 P. 381.)

[6] Part A of the ordinance declares: "It is the purpose of these regulations to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to ensure that signing is used as identification and not as advertisement; and to preserve and improve the appearance of the City as a place in which to live and work.

"It is the intent of these regulations to protect an important aspect of the economic base of the City by preventing the destruc-

hazards brought about by distracting advertising displays and the improvement of the appearance of the city. Since these goals are proper objectives for the exercise of the city's police power, the city council, asserting its legislative judgment, could reasonably believe the instant ordinance would further those objectives.

Plaintiffs cannot question that a city may enact ordinances under the police power to eliminate traffic hazards. They maintain, however, that the city failed to prove in opposition to plaintiffs' motion for summary judgment that the ordinance reasonably relates to that objective. We could reject plaintiffs' argument on the simple ground that plaintiffs, as the parties asserting the unconstitutionality of the ordinance, bear the burden of proof (see *Associated Home Builders, etc., Inc.* v. *City of Livermore, supra*, 18 Cal.3d 582, 609, 135 Cal. Rptr. 41, 557 P.2d 473), and cannot rely upon the city's failure of proof. To avoid unnecessary litigation upon remand of this cause, however, we have probed plaintiffs' broader argument: We hold as a matter of law that an ordinance which eliminates billboards designed to be viewed from streets and highways reasonably relates to traffic safety.

Billboards are intended to, and undoubtedly do, divert a driver's attention from the roadway. Whether this distracting effect contributes to traffic accidents invokes an issue of continuing controversy.[7] But as the New York Court of

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tion of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions; to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare."

[7] "No matter what one's position on the sign and safety issue one can find the study to support it . . . . [D]espite the insights pro-

Appeals pointed out, "mere disagreement" as to "whether billboards or other advertising devices . . . constitute a traffic hazard . . . may not cast doubt on the statute's validity. Matters such as these are reserved for legislative judgment, and the legislative determination, here expressly announced, will not be disturbed unless manifestly unreasonable." (*New York State Thruway Auth.* v. *Ashley Motor Ct.* (1961) 10 N.Y.2d 151, 218 N.Y.S.2d 640, 176 N.E.2d 566.) Many other decisions have upheld billboard ordinances on the ground that such ordinances reasonably relate to traffic safety;[8] we cannot find it manifestly unreasonable for the San Diego City Council to reach the same conclusion. As the Kentucky Supreme Court said in *Moore* v. *Ward* (1964) 377 S.W.2d 881, 884: "Even assuming [plaintiffs] could produce substantial evidence that billboard signs do not adversely affect traffic safety, . . . the question involves

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vided by statistical analyses, the case for the hazards of private signs rests largely upon common sense and the informed judgments of traffic engineers and other experts. The arguments are complex and sometimes highly technical, but on the whole, the courts are increasingly likely to conclude that regulation of private signs may be reasonably expected to enhance highway safety." (Dowds, *Private Signs and Public Interests*, in 1974 Institute on Planning, Zoning and Eminent Domain, p. 231.)

[8] See *City of Escondido* v. *Desert Outdoor Advertising, Inc.* (1973) 8 Cal.3d 785, 790, 106 Cal.Rptr. 172, 505 P.2d 1012; *E. B. Elliott Adv. Co.* v. *Metropolitan Dade County* (5th Cir.) 425 F.2d 1141, 1152; *General Outdoor Adv. Co.* v. *Department Pub. Works* (1935) 289 Mass. 149, 171, 193 N.E. 799; *Newman Signs, Inc.* v. *Hjelle* (N.D. 1978) 268 N.W.2d 741, 757, appeal dismissed (1979) 440 U.S. 901, 99 S.Ct. 1205, 59 L.Ed.2d 449; *Opinion of the Justices* (1961) 103 N.H. 268, 169 A.2d 762; *United Advertising Corp.* v. *Metuchen* (1964) 42 N.J. 1, 4, 198 A.2d 477; *State* v. *Lotze* (1979) 92 Wash.2d 52, 593 P.2d 811, 813-814, appeal dismissed, —— U.S. ——, 100 S.Ct. 257, 62 L.Ed.2d 177; *Markham Advertising Co.* v. *State* (1978) 73 Wash.2d 405, 416, 439 P.2d 248, app. dismissed (1969) 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512.

so many intangible factors as to make debatable the issue of what the facts establish. Where this is so, it is not within the province of courts to hold a statute invalid by reaching a conclusion contrary to that of the legislature."

We further hold that even if, as plaintiffs maintain, the principal purpose of the ordinance is not to promote traffic safety but to improve the appearance of the community, such a purpose falls within the city's authority under the police power. In contending that aesthetic considerations cannot justify the exercise of the police power to prohibit billboards, plaintiffs rely on *Varney & Green* v. *Williams* (1909) 155 Cal. 318, 100 P. 867, which held unconstitutional an ordinance of the City of East San Jose prohibiting all advertising billboards. Asserting that the ordinance rested solely on the "promotion of aesthetic or artistic considerations," we stated that "it has never been held that these considerations alone will justify, as an exercise of the police power, a radical restriction of the right of an owner of property . . . ." (*Id.* at p. 320, 100 P. at p. 868, quoting *City of Passaic* v. *Patterson Bill Posting Co.* (1905) 72 N.J.L. 285, 287, 62 A. 267.)

Constrained by this precedent, subsequent California Court of Appeal decisions have stated that aesthetic considerations cannot justify an ordinance prohibiting billboards. (See *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino* (1967) 255 Cal.App.2d 765, 769, 63 Cal. Rptr. 543; *County of Santa Barbara* v. *Purcell, Inc.* (1967) 251 Cal.App.2d 169, 173, 59 Cal.Rptr. 345; *National Advertising Co.* v. *County of Monterey* (1962) 211 Cal.App.2d 375, 379, 27 Cal.Rptr. 136.) Only one decision, however, has actually invalidated a city ordinance on this ground. (*City of Santa Barbara* v. *Modern Neon Sign Co.* (1961) 189 Cal.

App.2d 188, 191-194, 11 Cal.Rptr. 57.) In all other cases the courts have found some additional ground for the ordinance, such as elimination of driving hazards or promotion of tourist traffic. Relying on such additional grounds, the cases conclude that the ordinance did not become unconstitutional merely because aesthetic considerations may have played some part in motivating its enactment.[9]

Thus we could distinguish the present case from *Varney & Green* v. *Williams, supra,* 155 Cal. 318, 100 P. 867, on the ground that the present ordinance was not enacted exclusively for aesthetic purposes. We believe, however, that the holding of *Varney & Green* v. *Williams,* that aesthetic purposes alone cannot justify assertion of the police power to ban billboards, is unworkable, discordant with modern thought as to the scope of the police power, and therefore compels forthright repudiation.

Because this state relies on its scenery to attract tourists and commerce, aesthetic considerations assume economic value. Consequently any distinction between aesthetic and economic grounds as a justification for billboard regulation must fail. "Today, economic and aesthetic considerations together constitute the nearly inseparable warp and woof of the fabric upon which the modern city must design its future." (*Metromedia, Inc.* v. *City of Pasadena, supra,* 216 Cal.App.2d 270, 273, 30 Cal.Rptr. 731, 733; *Burk* v. *Muni-*

[9] See *Desert Outdoor Advertising Inc.* v. *County of San Bernardino, supra,* 255 Cal.App.2d 765, 769, 63 Cal.Rptr. 543; *County of Santa Barbara* v. *Purcell, Inc., supra,* 251 Cal.App.2d 169, 173, 59 Cal.Rptr. 345; *Burk* v. *Municipal Court* (1964) 229 Cal.App.2d 696, 701-702, 40 Cal.Rptr. 425; *Metromedia, Inc.* v. *City of Pasadena* (1963) 216 Cal.App.2d 270, 273, 30 Cal.Rptr. 731; *National Advertising Co.* v. *County of Monterey, supra,* 211 Cal.App.2d 375, 378-379, 27 Cal.Rptr. 136; see also *City of Escondido* v. *Desert Outdoor Advertising, Inc. supra,* 8 Cal.3d 785, 790, 106 Cal.Rptr. 172, 505 P.2d 1012.

cipal Court, supra, 229 Cal.App.2d 696, 702, 40 Cal.Rptr. 425.)

The holding of *Varney & Green* v. *Williams* also conflicts with present concepts of the police power. Most jurisdictions now concur with the broad declaration of Justice Douglas in *Berman* v. *Parker* (1954) 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27: "The concept of the public welfare is broad and inconclusive. [Citation.] The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled." (*Id.,* at p. 33, 75 S.Ct. at pp. 102-103.) Although Justice Douglas tendered this description in a case upholding the exercise of the power of eminent domain for community redevelopment, it has since been recognized as a correct description of the authority of a state or city to enact legislation under the police power. (*Village of Belle Terre* v. *Boraas* (1974) 416 U.S. 1, 5-6, 94 S.Ct. 1536, 1539, 39 L.Ed.2d 797; *City of Phoenix* v. *Fehlner* (1961) 90 Ariz. 13, 17, 363 P.2d 607; *People* v. *Stover* (1963) 12 N.Y.2d 462, 467-468, 240 N.Y.S.2d 734, 737-38, 191 N.E.2d 272, 274-75; *Oregon City* v. *Hartke* (1965) 240 Or. 35, 48, 400 P.2d 255; *Markham Advertising Co.* v. *State, supra,* 73 Wash.2d 405, 424, 439 P.2d 248.) As the Hawaii Supreme Court succinctly stated: "We accept beauty as a proper community objective, attainable through use of the police power." (*State* v. *Diamond Motors, Inc.* (1967) 50 Haw. 33, 36, 429 P.2d 825, 827.)[10]

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[10] Among other decisions holding that a state or city pursuant to the police power may ban billboards on the basis of aesthetic considerations alone are: *Meritt* v. *Peters* (Fla. 1953) 65 So.2d 861; *John Donnelly & Sons* v. *Mallar* (D.Me.1978) 453 F.Supp.

Present day city planning would be virtually impossible under a doctrine which denied a city authority to legislate for aesthetic purposes under the police power. Virtually every city in this state has enacted zoning ordinances for the purpose of improving the appearance of the urban environment and the quality of metropolitan life. Many municipalities engage in projects of one type or another designed to beautify their communities. Indeed, *Varney & Green* v. *Williams* itself asserted "That the promotion of aesthetic or artistic considerations is a proper object of governmental care will properly not be disputed." (155 Cal. 318, 320, 100 P. 867, 868.) But as the New York Court of Appeals pointed out, "Once it be conceded that aesthetics is a valid subject

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1272; *Donnelly Advertising Corp.* v. *City of Baltimore* (1977) 279 Md. 660, 370 A.2d 1127, 1133; *E. B. Elliott Adv. Co.* v. *Metropolitan Dade County, supra,* 425 F.2d 1141, 1151; *Stuckey's Stores, Inc.* v. *O'Cheskey* (1979) 93 N.M. 312, 600 P.2d 258, 264; *Matter of Cromwell* v. *Ferrier* (1967) 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749; *Opinion of the Justices, supra,* 103 N.H. 268, 169 A.2d 762; *Markham Advertising Co.* v. *State, supra,* 73 Wash.2d 405, 424, 439 P.2d 248; *John Donnelly & Sons* v. *Outdoor Advertising Bd.* (1970) 369 Mass. 206, 339 N.E.2d 709.

Indeed, the four cases cited in *Varney & Green* v. *Williams* to support the proposition that aesthetic considerations will not uphold a prohibition on billboards are no longer law in their respective jurisdictions. *City of Passaic* v. *Patterson Bill Posting Co., supra,* 72 N.J.L. 285, 62 A. 267, was repudiated by the New Jersey Constitution in 1947. *Commonwealth* v. *Boston* (1905) 188 Mass. 348, 74 N.E. 601, was overruled in *General Outdoor Advertising Co.* v. *Dept. of Public Works* (1935) 289 Mass. 149, 159-161, 193 N.E. 799; *Bryan* v. *City of Chester* (1905) 212 Pa. 259, 61 A. 894, was distinguished as antedating enactment of zoning enabling legislation by the court in *Silver* v. *Zoning Board* (1955) 381 Pa. 41, 112 A.2d 84. *People* v. *Green* (1903) 85 App.Div. 400, 83 N.Y.S. 460 was rejected in *People* v. *Stover, supra,* 12 N.Y.2d 462, 466-467, 240 N.Y.S.2d 734, 736-737, 191 N.E.2d 272, 274-275, and *Matter of Cromwell* v. *Ferrier, supra,* 19 N.Y.2d 263, 270, 279 N.Y.S.2d 22, 27, 225 N.E.2d 749, 753.

of legislative concern the conclusion seems inescapable that reasonable legislation designed to promote that end is a valid and permissible exercise of the police power. . . . [W]hether such a statute or ordinance should be voided should depend upon whether the restriction was 'an arbitrary and irrational method of achieving an attractive . . . community—and *not* upon whether the objectives were primarily aesthetic.'" (*People* v. *Stover, supra,* 12 N.Y.2d 462, 240 N.Y.S.2d 734, 191 N.E.2d 272.)

In a subsequent decision, the New York Court of Appeals confirmed that aesthetic considerations may justify the exercise of the police power to ban all off-site billboards in a community. (*Suffolk Outdoor Adv. Co., Inc.* v. *Hulse* (1977) 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373, N.E.2d 263, app. dism., 439 U.S. 808, 99 S.Ct. 66, 58 L.Ed.2d 101.) "It cannot be seriously argued," the New York court said, "that a prohibition of this nature is not reasonably related to improving the aesthetics of the community." (*Id.*, at p. 490, 402 N.Y.S. 2d at p. 371, 373 N.E.2d at p. 266.)[11] The fact that the ordinance bans billboards in commercial and industrial areas, and that it permits on-site signs, does not demonstrate that the ordinance as a whole lacks a reasonable relationship to improving community appearance. (*E. B. Elliott Adv. Co.* v. *Metropolitan Dade County, supra,* 425 F.2d 1141, 1152.) "[T]he notion that an extensively com-

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[11] Numerous cases have commented on the unaesthetic impact of highway billboards. (See, e.g., *State* v. *Diamond Motors, supra,* 50 Haw. 33, 36, 429 P.2d 825; *United Advertising Corp.* v. *Metuchen, supra,* 42 N.J. 1, 6, 198 A.2d 447; *Markham Advertising Co.* v. *State, supra,* 73 Wash.2d 405, 417, 439 P.2d 248.) Public opinion surveys sponsored by the Federal Highway Beautification Commission indicate that the general public agrees that billboards are unsightly. (See Dowds, *Private Signs and Public Interests, op. cit. supra,* p. 233.)

mercial or industrial area will be made more attractive by the absence of billboards is open to debate. Since the issue is debatable, however, the modern judicial presumption in favor of legislation [requires the court] to uphold the ordinance as a rational means of enforcing the legislative purpose of preserving aesthetics." (Lucking, *The Regulation of Outdoor Advertising: Past, Present and Future* (1977) 6 Environmental Aff. 179, 188.)

If the San Diego ordinance reasonably relates to the public safety and welfare, it should logically follow that the ordinance represents a valid exercise of the police power. Plaintiffs contend, however, that the police power is subject to an additional limiting doctrine: That regardless of the reasonableness of the act in relation to the public health, safety, morals and welfare the police power can never be employed to prohibit completely a business not found to be a public nuisance.

This argument also rests on our decision in *Varney & Green* v. *Williams, supra,* 155 Cal. 318, 100 P. 867. There the court, as an alternative ground for its decision, held the East San Jose ordinance unconstitutional on the grounds that it did "not attempt . . . regulation, but undertakes to absolutely forbid the erection or maintenance of any billboard for advertising purposes." (P. 321, 100 P.P. 868.) No California decision since *Varney & Green* has invalidated a billboard ordinance as prohibitory, but a few decisions of other states have struck down billboard ordinances on this ground. (See *Combined Communications Corp.* v. *Denver* (1975) 189 Colo. 462, 542 P.2d 79, 82-83; *Metromedia, Inc.* v. *City of Des Plaines* (1975) 26 Ill.App.3d 942, 326 N.E.2d 59, 61-62; *Stoner McCray System* v. *City of Des Moines* (1956) 247 Iowa 1313, 1319-1320, 78 N.W.2d 843;

Norate Corp., Inc. v. *Zoning Board of Adjustment* (1955) 417 Pa. 397, 407, 207 A.2d 890.)

For the reasons we shall offer, however, we believe that this doctrine, too, conflicts with reality and with current views of the police power. The distinction between prohibition and regulation in this case is one of words and not substance. "[E]very regulation necessarily speaks as a prohibition." (*Goldblatt* v. *Hempstead* (1962) 369 U.S. 590, 592, 82 S.Ct. 987, 989, 8 L.Ed.2d 130.) In the present case, for example, plaintiffs describe the ordinance as a *prohibition of off-site advertising,* while the city describes it as a *regulation of advertising,* one which limits advertising to on-site signs. Surely the validity of the ordinance does not depend on the court's choice between such verbal formulas.

Rather than strive to develop a logical distinction between "regulation" and "prohibition," and to find themselves embroiled in language rather than fact, courts of other jurisdictions in recent decisions have held that a community can entirely prohibit off-site advertising. (*John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272; *Murphy, Inc.* v. *Westport* (1944) 131 Conn. 292, 40 A.2d 177; *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd., supra,* 369 Mass. 206, 339 N.E.2d 709; *Suffolk Outdoor Adv. Co., Inc.* v. *Hulse, supra,* 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263; *Matter of Cromwell* v. *Ferrier, supra,* 19 N.Y.2d 263, 279 N.Y.S.2d 22, 225 N.E.2d 749.) These decisions fall within the general principle that a community may exclude any or all commercial uses if such exclusion reasonably relates to the public health, safety, morals or general welfare. (*Town of Los Altos Hills* v. *Adobe Creek Properties, Inc.* (1973) 32 Cal.App.3d 488, 502-504, 108 Cal.Rptr. 271, and cases there cited; see *Associated Home Builders, etc., Inc.* v. *City*

of Livermore, supra, 18 Cal.3d 582, 606, fn. 23, 135 Cal.Rptr. 41, 557 P.2d 473.) As the Oregon Supreme Court explained in *Oregon City* v. *Hartke, supra,* 240 Or. 35, 400 P.2d 255, "[I]t is within the police power of the city wholly to exclude a particular use if there is a rational basis for the exclusion. . . . It is not irrational for those who must live in a community from day to day to plan their physical surroundings in such a way that unsightliness is minimized. The prevention of unsightliness by wholly precluding a particular use within the city may inhibit the economic growth of the city or frustrate the desire of someone who wishes to make the proscribed use, but the inhabitants of the city have the right to forego the economic gain and the person whose business plans are frustrated is not entitled to have his interest weighed more heavily than the predominant interest of others in the community." (Ps. 49-50, 400 P.2d p. 263.)

Plaintiffs stress that most of the cases upholding a community ban on billboards or other commercial uses have involved small, predominantly residential, towns or rural localities. Recently, however, the Massachusetts Supreme Judicial Court upheld an ordinance similar to the one at issue here involving a total prohibition of billboards in a densely populated town with a sizable business and industrial district. (*John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd., supra,* 369 Mass. 206, 339 N.E.2d 709.) The court there stated that "We believe that it is within the scope of the police power for the town to decide that its total living area should be improved so as to be more attractive to both its residents and visitors. Whether an area is urban, suburban or rural should not be determinative of whether the residents are entitled to preserve and enhance their environment. Urban residents are not immune to ugliness." (P. 720.)

Relying on the cited Massachusetts decision, the United States District Court for the District of Maine recently upheld a statewide ban on off-site commercial billboards, including urban regions within the state. Its decision observes that it "can find no rational basis for concluding . . . that residents of and visitors to urban, commercial or industrial districts are not entitled to the benefit of an aesthetically pleasing environment, while those living in or visiting suburban, residential or rural regions are." (*John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272, 1281.)

Nor do we perceive how we could rationally establish a rule that a city's police power diminishes as its population grows, and that once it reaches some unspecified size it no longer has the power to prohibit billboards. San Diego, for example, has already prohibited billboards within *97 percent of its limits*—a region which in area and population far surpasses most California cities. Plaintiffs claim that a ban covering 97 percent of the city is a "regulation," while the extension of that ban to the remaining 3 percent of the city is a "prohibition," but such sophistry is a mere play upon words.

Thus the validity of Ordinance No. 10795 under the police power does not turn on its regulatory or prohibitory character, nor upon the size of the city which enacted it, but solely on whether it reasonably relates to the public safety and welfare. As we have explained, the ordinance recites that it was enacted to eliminate traffic hazards, improve the appearance of the community, and thereby protect property values. The asserted goals are proper objectives under the police power, and plaintiffs have failed to prove that the ordinance lacks a reasonable relationship to the achievement of those goals. We conclude that the summary judg-

ment cannot be sustained on the ground that the ordinance exceeds the city's authority under the police power.[12]

3. *The summary judgment cannot be sustained on the ground that the San Diego ordinance on its face abridges freedom of speech.*

Although the trial court held that the San Diego ordinance unconstitutionally invaded the First Amendment rights of billboard advertisers, controlling precedent invalidates that conclusion. On almost every occasion in which a law which prohibited off-site commercial billboards has been challenged as an abridgment of freedom of speech, the courts have rejected that challenge and sustained the law. (See *Howard* v. *State Dept. of Hwys. of Colorado* (10th Cir. 1973) 478 F.2d 581; *John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272; *John Donnelly & Sons, Inc.* v. *Outdoor Advertising Bd., supra,* 369 Mass. 206, 339 N.E.2d 709; *Donnelly Advertising Corp.* v. *City of Baltimore, supra,* 279 Md. 660, 370 A.2d 1127, 1132; *Newman Signs, Inc.* v. *Hjelle, supra,* 268 N.W.2d 741, 760-762; *United Advertising Corp.* v. *Borough of Raritan* (1952) 11 N.J. 144, 93 A.2d 362; *Stuckey's Stores, Inc.* v. *O'Cheskey, supra,* 93 N.M. 312, 600 P.2d 258; *Suffolk Outdoor Advertising Co., Inc.* v. *Hulse, supra,* 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373

[12] *Varney & Green* v. *Williams, supra,* 155 Cal. 318, 100 P. 867, is hereby overruled. Language in the following cases contrary to the views expressed herein is disapproved; *City of Escondido* v. *Desert Outdoor Advertising, Inc., supra,* 8 Cal.3d 785, 106 Cal. Rptr. 172, 505 P.2d 1012; *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino, supra,* 255 Cal.App.2d 765, 63 Cal.Rptr. 543; *County of Santa Barbara* v. *Purcell, Inc., supra,* 251 Cal.App. 2d 169, 59 Cal.Rptr. 345; *National Advertising Co.* v. *County of Monterey, supra,* 211 Cal.App.2d 375, 27 Cal.Rptr. 136; *City of Santa Barbara* v. *Modern Neon Sign Co., supra,* 189 Cal.App.2d 188, 11 Cal.Rptr. 57.

N.E.2d 263; *Lubbock Poster Co.* v. *City of Lubbock* (Tex. Civ.App. 1978) 569 S.W.2d 935, 945; *Ackerley Communications, Inc.* v. *City of Seattle* (1979) 92 Wash.2d 905, 602 P.2d 1177; *State* v. *Lotze, supra,* 92 Wash.2d 52, 593 P.2d 811, 813-815; *Markham Advertising Co.* v. *State, supra,* 73 Wash.2d 405, 439 P.2d 248.)[13]

Plaintiffs note that some of the decisions in point relied heavily on *Valentine* v. *Chrestensen* (1942) 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 in which the Supreme Court declared that "the Constitution imposes no . . . restraint on government as respects purely commercial advertising." (*Id.,* at p. 54, 62 S.Ct. at p. 921.) Within the last five years, a series of that court's decisions have repudiated *Valentine* v. *Chrestensen* and held that commercial speech may command First Amendment protection. (*Bigelow* v. *Virginia* (1975) 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600; *Virginia Pharmacy Board* v. *Virginia Consumer Council* (1976) 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346; *Linmark Associates* v. *Township of Willingboro* (1977) 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155; *Bates* v. *State Bar*

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[13] The only exception is an unreported decision of a Colorado district court in *Combined Communications Corporation* v. *City and County of Denver,* cited in the trial court's memorandum opinion. The Colorado Supreme Court subsequently affirmed the decision without discussion of the First Amendment issue. (*Combined Communications Corp.* v. *Denver* (1975) 189 Colo. 462, 542 P.2d 79.)

The Oklahoma Supreme Court in *State ex rel. Dept. of Transp.* v. *Pile* (1979) 603 P.2d 337 held a state law prohibiting the erection of billboards within 660 feet of federal highways in rural areas violated an Oklahoma constitutional free speech provision as applied to prohibit a noncommercial billboard. The opinion is cast in broad terms which imply that the federal Highway Beautification Act and all state laws enacted to conform to that act abridge freedom of speech. The specific holding of the court, however, is limited to a question of Oklahoma constitutional law, and is distinguishable on several counts from the present case.

of Arizona (1977) 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810.) Plaintiffs contend that as a result of these decisions, a law prohibiting commercial billboards can no longer be sustained.

When first presented to us, plaintiffs' First Amendment contention presented an arguable issue. While this case was pending before us, however, the New York Court of Appeals, in *Suffolk Outdoor Advertising Co.* v. *Hulse, supra,* 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263, upheld a community-wide ban on off-site billboards. The advertising company appealed to the United States Supreme Court, which dismissed the appeal for want of a substantial federal question. (439 U.S. 808, 99 S.Ct. 66, 58 L.Ed.2d 101.) Subsequently the court also dismissed appeals in two cases which sustained state laws banning off-site billboards outside of commercial or industrial areas. (*Newman Signs, Inc.* v. *Hjelle, supra,* 268 N.W.2d 741; *State* v. *Lotze, supra,* 92 Wash.2d 52, 593 P.2d 811.)

Each of the cited cases in which the Supreme Court dismissed appeals expressly rejected the contention that a prohibition on off-site billboards conflicts with the reasoning of the commercial speech cases. Since the Supreme Court regards the dismissal of an appeal as a decision on the merits (*Hicks* v. *Miranda* (1975) 422 U.S. 332, 343-345, 95 S.Ct. 2281, 2288-90, 45 L.Ed.2d 223), we conclude that the high court has resolved that a prohibition of off-site billboards does not violate the First Amendment.

An issue remains as to whether the San Diego ordinance violates the free speech clause of the California Constitution. (Art. I, § 2.) We therefore set forth our reasons for concluding that the San Diego ordinance is a permissible regulation of the time, place, and manner of speech, and

thus does not abridge freedom of speech under the California Constitution.

Eight decisions of other jurisdictions, filed after the United States Supreme Court first ruled that commercial speech is protected under the First Amendment, have each held that laws prohibiting commercial off-site billboards do not impair freedom of speech. (See cases cited pp. 519, 520 of 164 Cal.Rptr., ante.) The opinion of Judge Gignoux in *John Donnelly & Sons* v. *Mallar, supra,* presents a comprehensive exposition of the validity of such laws as regulations of the time, place, or manner of speech. That opinion points out that an ordinance which regulates commercial speech will pass constitutional inspection as a lawful regulation of the time, place, and manner of speech if it satisfies three criteria: "the restriction on speech must be 'justified without reference to the content of the regulated speech,' (2) the restriction must 'serve a significant governmental interest,' and (3) in so doing, the restriction must 'leave open ample alternative channels for communication of the information.'" (*John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272, 1277, citing *Linmark Associates* v. *Township of Willingboro, supra,* 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155 and *Virginia Pharmacy Board* v. *Virginia Consumer Council, supra,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346.) The San Diego ordinance complies with these requirements.

First, the instant ordinance does not seek to suppress the content of the advertiser's message. Each of the high court decisions on which plaintiffs rely struck down laws aimed at the suppression of a particular message based on the content of that message. *Bigelow* invalidated a law prohibiting advertising which explained how to obtain an abortion; *Virginia Pharmacy Board* invalidated a law

banning advertisement of drug prices; *Linmark* invalidated an ordinance banning residential "for sale" and "sold" signs; *Bates* invalidated a state bar rule against attorney advertising. Ordinance No. 10795, by way of contrast, was not enacted to prevent an advertiser from communicating his message to the public, but only to bar him from using a particularly unsightly and intrusive mode of communication.

Second, as we have already explained, the ordinance serves significant governmental interests—promoting traffic safety and improving the appearance of the community —unrelated to the suppression of free expression. (Cf. *United States* v. *O'Brien* (1968) 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672.)

Finally, the ordinance leaves open adequate alternative means of communication. In upholding a Maine statute which imposed a statewide ban on off-site commercial billboards, the federal district court observed that the act "leaves open ample alternative channels for communication of the information now carried by off-premises outdoor advertising. . . . Many, if not all, of the commercial messages displayed on off-premises signs can be conveyed to the traveling public through on-premises advertising, official business directional signs, and tourist information centers and publications, all of which are sanctioned by the Act. . . . Other forms of print media, which, like outdoor advertising, enjoy the advantage of being relatively low in cost, such as pamphleting and leafleting, lie beyond the scope of the Act altogether. . . ." (*John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272, 1279-1280.)

The New York Court of Appeals, sustaining a community ordinance which prohibited all off-site billboards, reached the same conclusion: "Although prohibiting non-

accessory billboards, the ordinance permits the maintenance of accessory or on-premises billboards, thus providing an operative means of advertising." (*Suffolk Outdoor Advertising Co.* v. *Hulse, supra,* 43 N.Y.2d 483, 490, 402 N.Y.S.2d 368, 371, 373 N.E.2d 263, 266.) "Since the challenged ordinance . . . regulates only the place and manner in which billboards may be maintained, we conclude that [it] does not infringe the right to free speech guaranteed by the First Amendment." (*Id.,* at p. 489, 402 N.Y.S.2d at p. 370, 373 N.E.2d at p. 265.)

The foregoing decisions properly hold that a community ordinance prohibiting off-site commercial billboards leaves open adequate alternative means of communication. Advertisers of consumer products and services can communicate through newspapers, magazines, radio, and television. Local business can in addition employ on-site billboards. The relatively few non-commercial advertisers who would be restricted by the San Diego ordinance also possess a great variety of alternative means of communication, including some methods, such as leafleting, which are not more expensive than billboards.[14] The San Diego ordinance is not unique; over 100 cities and towns in California and the entire States of Hawaii, Maine, and Ver-

[14] Plaintiffs call attention to stipulation No. 28, which states in part that "Many businesses, politicians, and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." The possibility that the ordinance may impede an occasional advertiser from communicating his message to the public, however, is not sufficient to invalidate the ordinance *on its face.* In the present litigation, which pits only the owners of the billboards against the city, individual advertisers are not parties; such an advertiser retains the ability to assert that, owing to the absence of reasonable alternative means of communication, the ordinance cannot constitutionally *be applied* to prevent him from using a billboard to proclaim his message.

mont have banned off-site billboards; advertisers in such areas make use of other means of communicating with the public.

In arguing that the San Diego ordinance cannot be sustained as a regulation of time, place, and manner, plaintiffs cite to cases involving leaflets, soundtrucks, newspapers, maps, and other forms of communication which courts have held can be subjected only to narrowly drawn regulations serving a compelling governmental interest.[15] We do not find those cases controlling here. Unlike leaflets, newspapers, and the like, a billboard is a large, immobile, and permanent structure which like other structures is subject to zoning regulation. The city's right to regulate the commercial use of property, and to ban uses which imperil traffic safety or denigrate the appearance of the community justifies restrictions which go beyond those imposed upon more transitory or less obtrusive media.

We find support for our conclusion that the city's interest in regulating the commercial use of property justifies the instant ordinance in the decision of the United States Supreme Court in *Young* v. *American Mini Theatres* (1976) 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310. Upholding a zoning ordinance which prohibited adult theaters within 500 feet of residential areas or 1,000 feet of other adult establishments, the court held that the city's interest in regulating commercial use of real property outweighed the incidental effect of the ordinance upon First

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[15] See *Schneider* v. *State* (1939) 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (leaflets); *Welton* v. *City of Los Angeles* (1976) 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119 (roadside sale of maps); *Wollam* v. *City of Palm Springs* (1963) 59 Cal.2d 276, 29 Cal.Rptr. 1, 379 P.2d 481 (soundtrucks); *Kash Enterprises, Inc.* v. *City of Los Angeles* (1977) 19 Cal.3d 294, 138 Cal.Rptr. 53, 562 P.2d 1302 (newsracks).

Amendment values. (See 427 U.S. at p. 63, 96 S.Ct. at p. 2448; *id.*, at p. 76, 84, 96 S.Ct. at pp. 2455, 2459 (Powell, J, conc.).) Rejecting the contention that the challenged ordinance abridged freedom of speech, *Young* reiterated the principle that commercial speech acquires only a lesser degree of constitutional protection.[16] Significantly the court, to illustrate that principle, cited several examples of valid regulation of commercial speech, among which was the proposition that "A state statute may permit highway billboards to advertise businesses located in the neighborhood but not elsewhere." (427 U.S. at p. 68, 96 S.Ct. at p. 2451, citing the court's dismissal of the appeal in *Markham Advertising Co.* v. *State, supra,* 73 Wash.2d 405, 439 P.2d 248, app. dismissed, 393 U.S. 316, 89 S.Ct. 553, 21 L.Ed.2d 512.)[17]

The New York Court of Appeals also supports our distinction between billboards and other media. In 1976 that court held unconstitutional an ordinance which prohibited all commercial handbills. (*People* v. *Remeny* (1976) 40 N.Y.2d 527, 387 N.Y.S.2d 415, 355 N.E.2d 375.) One year

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[16] In *Ohralik* v. *Ohio State Bar Assn.* (1978) 436 U.S. 447, 98 S.Ct. 1912, 56 L.Ed.2d 444, the Supreme Court summarized the limited constitutional protection given commercial speech: "We have not discarded the 'commonsense' distinction between speech proposing a commercial transaction, which occurs in an area traditionally subject to government regulation, and other varieties of speech. . . . [W]e instead have afforded commercial speech a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression." (436 U.S. at pp. 455-456, 98 S.Ct. at p. 1918.)

[17] The Maryland Court of Appeals, sustaining a ban on billboards in the Oldtown urban renewal district of Baltimore, relied squarely on the Supreme Court decision in *Young* v. *American Mini Theatres.* (*Donnelly Advertising Corp.* v. *City of Baltimore, supra,* 279 Md. 660, 370 A.2d 1127, 1132.)

later, however, the court upheld an ordinance which prohibited all off-site billboards as a permissible regulation of the time, place, and manner of speech. (*Suffolk Outdoor Advertising Co., Inc.* v. *Hulse, supra,* 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263.)

In summary, San Diego asserts a strong interest in removing commercial off-site billboards to enhance the appearance of the community and to improve traffic safety. To further those ends, the city enacted a zoning ordinance which does not seek to suppress the content of the advertising messages, but only to prohibit one means by which such messages are placed before the public. A multitude of published decisions support the proposition that such an ordinance does not abridge freedom of speech. Finding that the recent commercial speech cases of the United States Supreme Court do not undermine those decisions, and that billboards, as permanent intrusive uses of land, may reasonably be distinguished from other media, we conclude that the San Diego ordinance does not on its face abridge freedom of speech under either the United States or California Constitutions.

4. *The San Diego ordinance is preempted by the Outdoor Advertising Act to the extent that the ordinance requires removal without compensation of billboards within 660 feet of federal interstate and primary highways.*

Plaintiffs contend that the summary judgment below should be sustained on the ground that Ordinance No. 10795 is preempted by provisions of the Outdoor Advertising Act (Bus. & Prof.Code, § 5200 et seq.). Plaintiffs rely on two provisions: Section 5226, which states generally the legislative policy and findings underlying the Outdoor

Advertising Act, and section 5412, which requires payment of compensation for removal of billboards when such compensation is necessary to protect the state's share of federal highway funds.

Section 5226 reads as follows: "The regulation of advertising displays adjacent to any interstate highway or primary highway . . . is hereby declared to be necessary to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively, recognizing that a reasonable freedom to advertise is necessary to attain such objectives. The Legislature finds:

"(a) Outdoor advertising is a legitimate commercial use of property adjacent to roads and highways.

"(b) Outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to exist in business areas, subject to reasonable controls in the public interest."

The significance of section 5226 is not clear. The section states broad policy objectives but neither expressly authorizes billboards in business areas nor explicitly limits the authority of municipalities to prohibit billboards in such areas. Although the findings of section 5226 could be read literally to authorize maintenance of billboards in commercial areas despite any contrary local prohibition[18] such an interpretation apparently conflicts with sec-

[18] If section 5226 were construed to authorize billboards in commercial areas of cities, including locations not adjacent to state or

tion 5229, which provides that "The provisions of this chapter shall not be construed to permit a person to place or maintain in existence . . . any outdoor advertising prohibited by . . . any ordinance of any city . . . ." Section 5230 further confirms the authority of a city under the police power; it states that "The governing body of any city, county, or city and county may enact ordinances, including, but not limited to, land use or zoning ordinances, imposing restrictions on advertising displays adjacent to any street, road, or highway equal to or greater than those imposed by this chapter." [19]

Viewed in context, section 5226 appears to be a statement of policy, adopted to explain why the Legislature enacted a statute providing for the eventual elimination of outdoor advertising displays adjacent to state and interstate highways in noncommercial areas, but not for the prohibition of such displays within business areas. The section does not constitute a substantive limitation on the police power of the municipality, and thus should not be construed to preempt municipal authority.

Section 5412, the other provision on which plaintiffs rest their preemption argument, does serve to preempt the San Diego ordinance to a limited extent. Section 5412 provides that: "If federal law requires the states to pay just com-

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interstate highways, it might be invalid as a regulation of a municipal affair. (See *Bishop* v. *City of San Jose* (1969) 1 Cal.3d 56, 63, 81 Cal.Rptr. 465, 460 P.2d 137.)

[19] Further lack of clarity arises from the language of section 5227, which states that "It is the intention of the Legislature to occupy the whole field of regulation by the provisions of this chapter except that nothing in this chapter prohibits . . . the passage by any county of reasonable land use or zoning regulations affecting the placing of advertising displays. . . ." If this language is intended to grant only counties, and not cities, authority to regulate advertising by zoning, it is inconsistent with section 5230.

pensation with regard to the removal of any advertising display, the owner or owners of such advertising display and the owner or owners of the land upon which such display is located, shall be paid just compensation. The sole intent of the Legislature in enacting this section is to comply with federal law, and it is otherwise not the intent of the Legislature to in any manner relinquish any of its powers relating to the removal of advertising displays under the police power." [20] As the language of the section demonstrates, it requires payment of compensation only when such payment is necessary to comply with *federal law.* (See 55 Ops.Cal.Atty.Gen. 1 (1972).) Analysis of the alleged preemptive effect of section 5412, consequently, requires a review of the provisions of the relevant federal statute, the Highway Beautification Act of 1965 (23 U.S.C. § 131), as amended in November of 1978 (see 92 Stat. 2700-2701).

Subsection (b) of the act provides for a 10 percent cut in federal-aid highway funds to any state which fails to provide effective control of outdoor advertising signs, displays, and devices which fall in either of two categories: (1) signs "within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the [Interstate System and the primary system of federal highways]," and (2) "those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected

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[20] The quoted language is the text of section 5412 as enacted in 1975. The language of prior section 5412 (enacted in 1970), and of prior section 5288.3a (enacted in 1967 and repealed by the enactment of § 5412) does not differ from the present section in any respect material to the instant case.

with the purpose of their message being read from such main traveled way." [21] Since all signs at issue in this litigation are located within urban areas, we are concerned only with the first category—signs within 660 feet of federal primary or interstate highways.

Under subsection (c), "effective control" of outdoor advertising signs requires that all signs within 660 feet of federal interstate and primary highways must be removed except for official and directional signs, signs advertising property for sale or lease, on-site advertising, landmark signs, and signs advertising free coffee.[22]

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[21] Subsection (b) reads in full as follows:

"(b) Federal-aid highway funds apportioned on or after January 1, 1968, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of outdoor advertising signs, displays, and devices which are within six hundred and sixty feet of the nearest edge of the right-of-way and visible from the main traveled way of the system, and Federal-aid highway funds apportioned on or after January 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, to any State which the Secretary determines has not made provision for effective control of the erection and maintenance along the Interstate System and the primary system of those additional outdoor advertising signs, displays, and devices which are more than six hundred and sixty feet off the nearest edge of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall be reduced by amounts equal to 10 per centum of the amounts which would otherwise be apportioned to such State under section 104 of this title, until such time as such State shall provide for such effective control. Any amount which is withheld from apportionment to any State hereunder shall be reapportioned to the other States. Whenever he determines it to be in the public interest, the Secretary may suspend, for such periods as he deems necessary, the application of this subsection to a State."

[22] Subsection (c) reads as follows:

"(c) Effective control means that such signs, displays, or devices after January 1, 1968, if located within six hundred and sixty

Subsection (d), however, provides that a state may agree with the Secretary of Transportation to permit signs whose size, lighting, and spacing are consistent with customary usage in areas zoned commercial or industrial; although subsection (d) is not explicit on the point, its apparent purpose is to permit signs in commercial and industrial areas which absent agreement would be prohibited by subsection (c).[23]

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feet of the right-of-way and, on or after July 1, 1975, or after the expiration of the next regular session of the State legislature, whichever is later, if located beyond six hundred and sixty feet of the right-of-way, located outside of urban areas, visible from the main traveled way of the system, and erected with the purpose of their message being read from such main traveled way, shall, pursuant to this section, be limited to (1) directional and official signs and notices, which signs and notices shall include, but not be limited to, signs and notices pertaining to natural wonders, scenic and historical attractions, which are required or authorized by law, which shall conform to national standards hereby authorized to be promulgated by the Secretary hereunder, which standards shall contain provisions concerning lighting, size, number, and spacing of signs, and such other requirements as may be appropriate to implement this section, (2) signs, displays, and devices advertising the sale or lease of property upon which they are located, (3) signs, displays, and devices, including those which may be changed at reasonable intervals by electronic process or by remote control, advertising activities conducted on the property on which they are located, (4) signs lawfully in existence on October 22, 1965, determined by the State, subject to the approval of the Secretary, to be landmark signs, including signs on farm structures or natural surfaces, of historic or artistic significance the preservation of which would be consistent with the purposes of this section, and (5) signs, displays, and devices advertising the distribution of nonprofit organizations of free coffee to individuals traveling on the Interstate System or the primary system. For the purposes of this subsection, the term 'free coffee' shall include coffee for which a donation may be made, but is not required."

[23] Subsection (d) reads as follows:

"(d) In order to promote the reasonable, orderly and effective display of outdoor advertising while remaining consistent with the

Pursuant to subsection (d), the State of California entered into an agreement in 1968 with the Secretary of Transportation to permit billboards, subject to restrictions on size, spacing, and similar matters, in commercial and industrial zones of all California cities. The agreement, however, contains a caveat: "Nothing contained herein shall be construed to abrogate or prohibit the State or any subdivision of the State from exercising a greater degree of control of outdoor advertising signs, displays and devices than that required by the Act or from adopting standards which are more restrictive in controlling outdoor advertising signs, displays and devices than the provisions of this Agreement." Hence the agreement itself does not prevent San Diego from prohibiting commercial off-site billboards; in effect, the state has elected to protect such billboards under a subsection (d) agreement only when communities within the state do not prohibit those billboards under the local police power. In 1972, by enacting

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purposes of this section, signs, displays, and devices whose size, lighting and spacing, consistent with customary use is to be determined by agreement between the several States and the Secretary, may be erected and maintained within six hundred and sixty feet of the nearest edge of the right-of-way within areas adjacent to the Interstate and primary systems which are zoned industrial or commercial under authority of State law, or in unzoned commercial or industrial areas as may be determined by agreement between the several States and the Secretary. The States shall have full authority under their own zoning laws to zone areas for commercial or industrial purposes, and the actions of the States in this regard will be accepted for the purposes of this Act. Whenever a bona fide State, county, or local zoning authority has made a determination of customary use, such determination will be accepted in lieu of controls by agreement in the zoned commercial and industrial areas within the geographical jurisdiction of such authority. Nothing in this subsection shall apply to signs, displays, and devices referred to in clauses (2) and (3) of subsection (c) of this section."

the ordinance at issue in this litigation, San Diego exercised its power under this caveat and prohibited off-site commercial billboards in areas of the city zoned for commerce or industry.

Finally, we come to subsection (g), the language of which is crucial to the determination of this appeal. That subsection, as amended in 1978, provides that "Just compensation shall be paid upon the removal of any outdoor advertising sign, display, or device lawfully erected under State law and not permitted under subsection (c) of this section, whether or not removed pursuant to or because of this section." [24]

Some of the billboards banned by the San Diego ordinance stand within 660 feet of federal interstate or primary highways. Since these are ordinary advertising billboards, not official signs, landmark signs, or other signs exempt from removal under the act, subsection (c) of the act required their removal. The 1968 agreement between the state and the Secretary of Transportation, however, permitted those billboards to remain standing unless a subdivision of the state adopted more restrictive standards. As we have stated, in 1972, San Diego enacted more restrictive standards by prohibiting off-site commercial billboards, thereby depriving those billboards of the protection of the 1968 agreement. The question therefore arises

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[24] The balance of subsection (g) specifies that "The Federal Share of such compensation shall be 75 per centum. Such compensation shall be paid for the following:

"(A) The taking from the owner of such sign, display, or device of all right, title, leasehold, and interest in such sign, display, or device; and

"(B) The taking from the owner of the real property on which the sign, display, or device is located, of the right to erect and maintain such signs, displays, and devices thereon."

whether just compensation must be paid upon the removal of billboards previously saved from removal by an agreement between the state and the Secretary of Transportation, but which no longer fall within the protective scope of that agreement.

In our opinion compensation is required. Subsection (g) of the Highway Beautification Act, as amended in 1978, requires compensation upon removal of any billboard "not permitted under subsection (c)." The only billboards permitted under subsection (c) are official signs, on-site advertising, and like exempt signs; the billboards in question do not fall within any of the exemptions and are therefore billboards "not permitted under subsection (c)." Under the literal language of the act, the fact that these billboards were previously protected by an agreement between the state and the Secretary of Transportation, an agreement authorized by subsection (d) of the act, has no bearing upon the fact that they are billboards "not permitted under subsection (c)." The literal language of the federal act therefore compels compensation.

This conclusion finds support in the legislative history of the 1978 amendment which added the phrase "not permitted under subsection (c)" to subsection (g) of the act. The Report of the House Committee on Public Works and Transportation indicated that whenever a state or local government did not exercise its option to enter into an agreement with the Secretary of Transportation to protect signs in commercial and industrial areas, then no distinction could be drawn between signs which could be protected by agreement under subsection (d) and those which could not; "all of the signs are nonconforming with the 'effective control' requirements of subsection (c), and the committee is of the opinion that subsection (g) requires

payment of just compensation for their removal. . . . [J]ust compensation must be paid upon the removal of any lawfully erected sign which is not permitted under subsection (c)." (Report, No. 95-1485, p. 16, U.S.Code Cong. & Admin. News 1978, pp. 6575, 6592.)

We have carefully considered the decision of the Washington Supreme Court in *Ackerley Communications, Inc.* v. *City of Seattle, supra,* 92 Wash.2d 905, 602 P.2d 1177. Denying compensation for removal of signs within commercial and industrial zones, *Ackerley* stated that "[s]ince signs within commercial and industrial zones which are not governed by an agreement between the State and the Department of Transportation are not regulated by, and are wholly outside the scope of, the federal statute, the only reasonable interpretation of the statutory language is that it does not require compensation for such signs." (602 P.2d at p. 1184.) We must respectfully disagree with the analysis of *Ackerley.* In our opinion, the federal statute does regulate signs within commercial and industrial zones which are not governed by a federal-state agreement —specifically, the act prohibits such signs unless they fall within the five exempt categories of subsection (c). Consequently, it requires compensation when those signs are removed.[25]

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[25] The City of San Diego, seconded by the City of Alameda as amicus, advance an argument similar to the *Ackerley* opinion. They contend that subsection (d) of the act and agreements between the state and the Secretary of Transportation pursuant to that subsection impliedly amend and limit the scope of subsection (c). The phrase "not permitted under subsection (c)," they contend, refers only to signs which are both barred by the express language of subsection (c)—that is, signs which are neither official signs, landmarks, or the like—*and* which could not have been protected from removal by a subsection (c) agreement. In other words, they maintain that compensation is required only when the act *as a*

The city argues that under the wording of subsection (g) prior to the 1978 amendments, compensation was not required for removal of any sign which constituted a nonconforming use under local zoning[26] (see *Lubbock Poster Co.* v. *City of Lubbock, supra,* 569 S.W.2d 935, 945), and urges that we should not give the 1978 amendments retrospective effect. The Federal Highway Administration, however, takes the position that the 1978 amendments apply to require compensation for "signs still in existence on November 6, 1978, and those additional signs which were removed prior to November 6, 1978, but were the subject of litigation pending on that date." (Memo. Fed. Highway Administrator, Mar. 6, 1979.) Since the Federal Highway Administration is the agency charged with the enforcement of the Highway Beautification Act, its interpretation of the act merits great weight. (See, e. g., *Northern Ind. Pub. Serv. Co.* v. *Walton League* (1975) 423 U.S. 12, 15, 96 S.Ct. 172, 173, 46 L.Ed.2d 156; *Los Angeles* v. *Public*

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whole compels the removal of a sign, and since the act permits signs in commercial and industrial areas which conform to a subdivision (c) agreement, compensation is not required when a local ordinance requires the removal of such signs.

We appreciate the policy arguments in favor of limiting the requirement of compensation to cases in which the act as a whole compels removal of the billboard. The cities' proffered construction of the amended act, however, cannot be reconciled with the language of the amended act and the legislative history of the amendments.

[26] Before 1978 subsection (g) required compensation upon removal of signs "lawfully in existence on the date of enactment of this subsection . . . [or] lawfully erected on or after January 1, 1968." The chief counsel of the Federal Highway Administration interpreted that ambiguous language to signify that when a sign became a nonconforming use it ceased to be lawfully erected, and thus no compensation was required for its removal. Following the 1978 amendment the Federal Highway Administration withdrew that opinion.

Utilities Com. (1975) 15 Cal.3d 680, 696, 125 Cal.Rptr. 779, 542 P.2d 1371.) Mindful of that interpretation, and of the risk that this state might lose substantial funds if we were to adopt a construction contrary to that of the federal administration, we conclude that the amended act applies to billboards in existence or removed subject to litigation as of November 6, the effective date of the amendments.

We believe that the Highway Beautification Act as amended requires the payment of compensation for removal of all billboards existing or subject to litigation on November 6, 1978, located within 660 feet of federal interstate or primary highways within San Diego and visible from the main traveled way of such highways. We reach that conclusion reluctantly, since its effect in this case and in future cases will probably frustrate the original intent of the Highway Beautification Act: to accelerate the removal of billboards and thereby "promote the safety and recreational value of public travel, and to preserve natural beauty." (23 U.S.C. § 131(a).)[27]

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[27] In opposing the 1978 amendment to the Highway Beautification Act, the chief counsel for the Federal Highway Administration stated that: "The proposed amendment will have the effect of severely limiting local prerogatives to control outdoor advertising by turning the Highway Beautification Act into a statute which protects signs from local land use decisions and ensuring compensation, irrespective of the reason for removal. This would represent an unprecedented limitation on local zoning authorities. Traditionally, localities have controlled outdoor advertising, along with other types of nonconforming land uses, under the police power, which would allow removal by amortization."

Subsequent to enactment of the amendments, the administration declined to budget funds for the highway beautification program. It explained to Congress that "in light of recently enacted legislation that drastically reduces the scope of the highway beautification program, the budget does not request any funds for this purpose pending completion of a comprehensive Department of

The 1978 amendments have, in effect, inverted the purpose of the act, making the secondary goal of ensuring compensation dominant over the primary goal of encouraging billboard removal. (See Steif, *The Billboards are Back,* The Progressive, p. 44 (June 1979).) Nevertheless, the language and administrative construction of the amended act clearly compel compensation, and local removal of billboards without compensation, even though undertaken to promote public safety and preserve natural beauty, would imperil the state's receipt of federal highway funds.

As we noted earlier, section 5412 of California's Outdoor Advertising Act sought to preempt local police power authority and to require payment of compensation when such preemption was necessary to protect California's receipt of federal highway funds. The City of San Diego contends that the regulation and removal of billboards is a municipal affair and that the Legislature thus may not constitutionally enact legislation which preempts local regulatory power. (See generally *Bishop* v. *City of San Jose, supra,* 1 Cal.3d 56, 62-63, 81 Cal.Rptr. 465, 460 P.2d 137.) We note, however, that receipt of federal highway funds is a matter of statewide concern; consequently local regulation and removal of billboards, to the extent that it endangers such receipt, becomes also a matter of statewide concern. The courts have recognized that municipal action which affects persons outside of the municipality becomes to that extent a matter which the sate is empowered to prohibit or regulate (*CEEED* v. *California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 321, 118

Transportation review of the program to determine if it can be successfully continued." (Budget U.S. Gov., Fiscal Year 1980, p. 184.)

Cal.Rptr.. 315 and cases there cited); the action of San Diego in that it affects the receipt of federal funds by the state or other California communities falls within that principle.

Accordingly we conclude that San Diego Ordinance No. 10795, to the extent that it permits the removal without compensation of billboards for which compensation is required under title 23, section 131 of the United States Code, is preempted by the California Outdoor Advertising Act, and hence invalid.[28] The application of Ordinance No. 10795 to billboards not protected by federal law—that is, to billboards more than 660 feet from federal interstate or primary highways, or billboards not in existence or removed subject to litigation on November 6, 1978—is not preempted by the Outdoor Advertising Act. The ordinance's proscription upon erection of future billboards is likewise unaffected by the federal requirement for just compensation and thus not preempted by state law.

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[28] The City of San Diego argues that "it is to be seriously questioned whether a Federal Act which purportedly is intended to provide 'effective control' and removal of billboards, but which in actuality, due to lack of funding to pay for removal, results in *protection* of billboards, can, without violating the Tenth Amendment of the United States Constitution, prevent use of local police powers under penalty of withholding federal monies." So long as federal funds are available, the Highway Beautification Act's program for a federal-state partnership in removing billboards visible from federal highways clearly presents no substantial issue under the Tenth Amendment. Since the record before us does not indicate that the federal government would not provide whatever funds are needed to pay its 75 percent share for the removal of billboards within 660 feet of federal highways in San Diego, we need not reach the issues that might be posed by federal regulation in the absence of funding.

5. *The San Diego ordinance does not deny plaintiffs the equal protection of the laws.*

We reject plaintiffs' contention that the city's failure to pay compensation for the removal of all of their billboards, in light of the requirement for compensation to owners of billboards within the preemptive scope of the Outdoor Advertising Act, denies the equal protection of the laws. Since the distinction involves purely economic regulation it may be sustained if the classification bears a rational relationship to a legitimate state purpose. (*People ex rel. Dept. of Transportation* v. *Desert Outdoor Advertising, Inc.* (1977) 68 Cal.App.3d 440, 450, 137 Cal.Rptr. 221.)

California decisions establish that a city seeking to eliminate nonconforming uses may pursue two constitutionally equivalent alternatives: It can eliminate the use immediately by payment of just compensation, or it can require removal of the use without compensation following a reasonable amortization period. (See *Livingston Rock etc. Co.* v. *County of L.A.* (1954) 43 Cal.2d 121, 127, 272 P.2d 4.) The choice between the alternatives largely involves budgetary considerations. The state has chosen to require compensation when the funds for such purpose are augmented by a 75 percent federal contribution. When such federal funds are not available, the state has not required compensation, and the city has accordingly chosen the more economical alternative of requiring abatement after expiration of an amortization period. We find no denial of equal protection in that decision. (See *Ackerley Communications, Inc.* v. *City of Seattle, supra,* 92 Wash.2d 905, 602 P.2d 1177, 1187.)

6. *The summary judgment cannot be sustained on the ground that the amortization period prescribed by the ordinance as applied to all or any of plaintiffs' signs is unreasonably short.*

The San Diego ordinance requires abatement of all off-site billboards following expiration of an amortization period. That period is computed in the following manner: First, the owner determines the original cost of the sign, including the cost of installation. Second, he deducts 10 percent of that cost for each year the sign has been standing prior to the effective date of the ordinance, arriving at a figure which the ordinance refers to as "the adjusted market value." The ordinance then provides an abatement schedule ranging from one year for signs with an "adjusted market value" of less than $500 to four years for signs with an "adjusted market value" in excess of $20,000.[29]

Finally, the ordinance states that notwithstanding the abatement schedule in the ordinance, any signs located within 500 feet of freeways or scenic highways must be removed within 90 days. This provision is based on the

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[29] The ordinance was enacted March 14, 1972. It provides the following abatement schedule:

"Adjusted Market Value			Abatement Date
Less than	$	500.00	April 1, 1973
$ 500.00 to		999.99	July 1, 1973
1,000.00 to		1,499.99	October 1, 1973
1,500.00 to		1,999.99	January 1, 1974
2,000.00 to		2,999.99	April 1, 1974
3,000.00 to		3,999.99	July 1, 1974
4,000.00 to		4,999.99	October 1, 1974
5,000.00 to		7,499.99	January 1, 1975
7,500.00 to		9,999.99	April 1, 1975
10,000.00 to		12,499.99	July 1, 1975
12,500.00 to		14,999.99	October 1, 1975
15,000.00 to		19,999.99	January 1, 1976
20,000.00		and over	April 1, 1976."

fact that such signs were rendered nonconforming uses by prior city zoning ordinances. Since those prior ordinances had been in force for about 3 years before the effective date of Ordinance No. 10795, the signs in question received an actual amortization period of at least 3 years and 90 days.

Thus the amortization period under the ordinance depends upon the conformity of the signs under prior ordinances, the original cost of the signs, and the time elapsed since erection of the signs. As the parties stipulated, the abatement schedule is not computed on the basis of current fair market value, useful life, or income generated by the signs. Relying on that stipulation, plaintiffs contend that the amortization period is unreasonable on its face and hence that the ordinance, to the extent that it requires removal of billboards without compensation or a reasonable amortization period, denies due process of law. The trial court in its memorandum opinion granting the motion for summary judgment found that plaintiffs had not provided sufficient proof that the abatement schedule was unreasonable as applied to their billboards.

The California cases have firmly declared that zoning legislation may validly provide for the eventual termination of nonconforming uses without compensation if it provides a reasonable amortization period commensurate with the investment involved. (*National Advertising Co.* v. *County of Monterey* (1970) 1 Cal.3d 875, 878, 83 Cal.Rptr. 577, 464 P.2d 33; *Livingston Rock etc. Co.* v. *County of Los Angeles, supra,* 43 Cal.2d 121, 127, 272 P.2d 4; *City of Los Angeles* v. *Gage* (1954) 127 Cal.App.2d 442, 454-460, 274 P.2d 34.) The determination of the length of a reasonable period of amortization is not merely a matter of accounting. "It is not required that the nonconforming property concerned

have no value at the termination date." (*Art Neon Co.* v. *City and County of Denver* (10th Cir. 1973) 488 F.2d 118, 121.) The determination instead involves a process of weighing the public gain to be derived from a speedy removal of the nonconforming use against the private loss which removal of the use would entail. (*Hadacheck* v. *Sebastian* (1915) 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348; *Art Neon Co.* v. *City and County of Denver, supra,* at p. 121; *National Advertising Co.* v. *County of Monterey, supra,* at p. 886, 83 Cal.Rptr. 577, 464 P.2d 33 (dis. opn. of Sullivan, J.); *City of La Mesa* v. *Tweed & Gambrell Planning Mill* (1956) 146 Cal.App.2d 762, 770, 304 P.2d 803; *City of Los Angeles* v. *Gage, supra,* at p. 461, 274 P.2d 34; *Modjeska Sign Studios, Inc.* v. *Berle* (1977) 43 N.Y.2d 468, 402 N.Y.S. 2d 359, 373 N.E.2d 255.)[30]

In reviewing the constitutionality of an ordinance providing for amortization of nonconforming billboards we held in *National Advertising Co.* v. *County of Monterey, supra,* 1 Cal.3d 875, 83 Cal.Rptr. 577, 464 P.2d 33, that a one-year amortization period was unreasonable except as to signs which had been fully depreciated for federal income tax purposes. (*Id.,* p. 880, 83 Cal.Rptr. 577, 464 P.2d 33.) Other decisions have also stated that a one-year amortization period is generally unreasonable (*National Advertising Co.* v. *County of Monterey, supra,* 211 Cal.App.2d 375, 381, 27 Cal.Rptr. 136; *City of Santa Barbara* v. *Modern*

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[30] In determining the reasonableness of the period of amortization a great variety of factors may be relevant. As listed in *Art Neon Co.* v. *City and County of Denver, supra,* 488 F.2d 118, 122, the factors include "[T]he nature of the nonconforming use, the character of the structure, the location, what part of the individual's total business is concerned, the time periods, salvage, depreciation for income tax purposes, and depreciation for other purposes, and the monopoly or advantage, if any, resulting from the fact that similar new structures are prohibited in the same area."

Neon Sign Co. (1961) 189 Cal.App.2d 188, 195-196, 11 Cal. Rptr. 57), but have upheld amortization periods ranging from two years and eight months (*People ex rel. Dept. Pub. Wks.* v. *Adco Advertisers* (1973) 35 Cal.App.3d 507, 513, 110 Cal.Rptr. 849), to three years (*City of Escondido* v. *Desert Outdoor Advertising, Inc., supra,* 8 Cal.3d 785, 106 Cal.Rptr. 172, 505 P.2d 1012; *Naegele Outdoor Adv. Co.* v. *Village of Minnetonka* (1968) 281 Minn. 492, 162 N.W.2d 206), to five years (*Art Neon Co.* v. *City and County of Denver, supra,* 488 F.2d 118, 122; *County of Santa Barbara* v. *Purcell, Inc., supra,* 251 Cal.App.2d 169, 59 Cal.Rptr. 345; *E. B. Elliott Adv. Co.* v. *Metropolitan Dade County, supra,* 425 F.2d 1141, 1154). In light of those decisions we conclude that the amortization period provided in the instant ordinance which ranges from one to four years, depending upon the depreciated value of the sign, is not unreasonable on its face.

Our conclusion that the amortization schedule established in the San Diego ordinance is not facially unreasonable does not demonstrate its validity as applied to each of plaintiffs' signs. The reasonableness of an amortization period as applied to each billboard depends in part upon facts peculiar to that structure (see *National Advertising Co.* v. *County of Monterey, supra,* 1 Cal.3d 875, 879, 83 Cal.Rptr. 577, 464 P.2d 33, and cases there cited; *Bohannan* v. *City of San Diego* (1973) 30 Cal.App.3d 416, 426, 106 Cal.Rptr. 333). Such facts include the cost of the billboard, its depreciated value, remaining useful life, the length and remaining term of the lease under which it is maintained, and the harm to the public if the structure remains standing beyond the prescribed amortization period.

Plaintiffs have the burden of proving the invalidity of the amortization period as applied to each of plaintiffs'

structures. (See *Art Neon Co.* v. *City and County of Denver, supra,* 488 F.2d 118, 121; *National Advertising Co.* v. *County of Monterey, supra,* 1 Cal.3d 875, 879, 83 Cal.Rptr. 577, 464 P.2d 33.) On motion for summary judgment plaintiffs did not attempt to meet this burden as to each structure, but limited their argument to the claim that the abatement schedule was facially unconstitutional because it was not based upon the fair market value or remaining useful life of the billboard. But even though the fair market value and remaining useful life are relevant considerations—they are among the factors which must be evaluated in defining the private loss which is balanced against the public benefit in order to determine the reasonable period of amortization—the failure of the city to base its abatement schedule upon such considerations does not necessarily render that schedule unconstitutional. If the amortization period prescribed by the ordinance is a reasonable one, the fact that the city arrived at that period by a formula which did not include every one of the relevant considerations does not render its ordinance unconstitutional.[31]

As we have stated, on their motion for summary judgment plaintiffs did not attempt to prove the amortization period was unreasonable as applied to specific signs, except for those signs located within 500 feet of freeways and scenic highways for which this ordinance prescribed an amortization period of only 90 days. The city explains, however, that such signs were already nonconforming uses pursuant to an ordinance enacted more than three years

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[31] Even if the amortization period were found to be unreasonable as to a particular property, that finding would "not invalidate its application to other property or invalidate the ordinance of which it is a part." (*Bohannan* v. *City of San Diego, supra,* 30 Cal.App.3d 416, 426, 106 Cal.Rptr. 333, 339.)

earlier and consequently that plaintiffs had already enjoyed an amortization period of three years with respect to such signs. Plaintiffs' evidence fails to demonstrate that an amortization period of three years and ninety days is unreasonably short as applied to any of the signs in question. We therefore conclude that the summary judgment in favor of plaintiffs cannot be sustained on the ground that the amortization period of the ordinance is unreasonable as to all or any of plaintiffs' billboards.

7. *The summary judgment cannot be sustained on the ground that the City Council of San Diego failed to comply with the California Environmental Quality Act.*

Plaintiffs contend that Ordinance No. 10795 is invalid because the city council failed before enacting that ordinance to prepare an environmental impact report as required by Public Resources Code section 21151. Plaintiffs' complaints, however, do not allege the city's noncompliance with the requirements of the California Environmental Quality Act, and although over three years elapsed between the filing of those complaints and plaintiffs' motion for summary judgment, plaintiffs offered no amendment to assert such noncompliance. On motion for summary judgment the pleadings define the issues; thus "'[I]n the absence of some request for amendment there is no occasion to inquire about possible issues not raised by the pleadings.'" (*Krupp* v. *Mullen* (1953) 120 Cal.App.2d 53, 57, 260 P.2d 629, 632; *Gardenswartz* v. *Equitable etc. Soc.* (1937) 23 Cal.App.2d Supp. 745, 752, 68 P.2d 322; see *Dawson* v. *Rash* (1958) 160 Cal.App.2d 154, 161, 324 P.2d 959.) The issue of the city's alleged noncompliance with the California Environmental Quality Act therefore was

not properly before the trial court on the motion for summary judgment, and thus cannot be asserted here as a ground for sustaining that judgment.

8. *Conclusion.*

In summary, we conclude that neither the federal nor the state Constitution bars a municipality from enacting a zoning ordinance which prohibits off-site billboards and requires removal of existing billboards after expiration of a reasonable amortization period. The Outdoor Advertising Act, however, preempts local law to bar the uncompensated removal of existing billboards located within 660 feet of federal interstate or primary highways. Plaintiffs accordingly may avoid uncompensated removal for any billboards falling within the preemptive scope of the Outdoor Advertising Act; plaintiffs also retain the right to show that the amortization period prescribed by the San Diego ordinance is unreasonably short as applied to some or all of their structures. Because plaintiffs have failed to demonstrate the invalidity of the ordinance on its face, however, the trial court erred in granting their motion for summary judgment.

To hold that a city cannot prohibit off-site commercial billboards for the purpose of protecting and preserving the beauty of the environment is to succumb to a bleak materialism. We conclude with the pungent words of Ogden Nash:

"I think that I shall never see
"A billboard lovely as a tree.
"Indeed, unless the billboards fall,
"I'll never see a tree at all."

The judgment is reversed.

BIRD, C. J., and MOSK and MANUEL, JJ., concur.

RICHARDSON, Justice, concurring.

I concur in the judgment. I share some of the substantial doubts raised by the dissent of Justice Clark, who discerns serious constitutional difficulties with any governmental scheme calling for the total prohibition of any legitimate business enterprise. Nonetheless, I am persuaded by the majority's analysis that the present ban on off-site billboards meets the minimum constitutional standards established by the United States Supreme Court and that, accordingly, the challenged ordinance must be upheld.

The high court has recently dismissed for want of a substantial federal question an appeal which raised identical issues. In *Suffolk Outdoor Adv. Co., Inc.* v. *Hulse* (1977) 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263, the New York Court of Appeals upheld a local ordinance totally banning all off-site billboards as a rational method of improving community aesthetics. The majority herein correctly observes that the subsequent dismissal of the appeal to the United States Supreme Court must be regarded as a dispositive decision on the merits. (*Hicks* v. *Miranda* (1975) 422 U.S. 332, 343-344, 95 S.Ct. 2281, 2288-2289, 45 L.Ed.2d 223, 235-236.) No convincing basis appears for distinguishing *Suffolk*. Accordingly, I agree with the judgment of reversal.

NEWMAN, Justice, concurring.

I share Justice Richardson's unease regarding the prohibition that Justice Clark finds illegal. Unlike both of them, however, I believe that we must examine carefully the state as well as the federal Constitution.

Article I, section 2 of the California Constitution declares: "Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press."

That second sentence is imperative. By no means does it imply that federal precedents confine freedom of expression in this state. (See art. I, § 24: "Rights guaranteed by this Constitution are not dependent on those guaranteed by the United States Constitution"; *Wilson* v. *Superior Court* (1975) 13 Cal.3d 652, 658, 119 Cal.Rptr. 468, 472, 532 P.2d 116, 120 ("A protective provision more definitive and inclusive than the First Amendment is contained in our state constitutional guarantee . . ."); Note, *Rediscovering the California Declaration of Rights* (1974) 26 Hastings L.J. 481.)

Notwithstanding Ogden Nash's poignant dictum (see next-to-last sentence of the majority opinion), I am not persuaded that this court should defer to city officials' views that one mode of communication in the city should be outlawed because it seems "particularly unsightly and intrusive" (maj. opn., p. 521 of 164 Cal.Rptr., p. 418 of 610 P.2d).

Some limits on time, place, and manner are of course permissible. Yet as the majority suggest (see their fn. 16), other varieties of speech indeed may merit more protection than is accorded "commercial speech." Further, I stress the brief reminder in footnote 14 of the majority opinion that an individual advertiser "retains the ability to assert that, owing to the absence of reasonable alternative means of communication, the ordinance cannot constitutionally *be applied* to prevent him from using a billboard to proclaim his message." (Cf. the exhibits in Annex A of the amicus brief filed here on August 27, 1979.)

The ordinance here ought to be redrafted. I hope the drafters will not feel too circumscribed by the majority's footnote 2, which purports (with no citation of legislative history) to proscribe signs that "clearly fall within the intendment of the enactment." Those signs are distinguished from "less obtrusive, noncommercial signs that present no significant aesthetic blight or traffic hazard." Then, in order to articulate that distinction, a definition in the Revenue and Taxation Code is endorsed somewhat heroically.

I find in the record no evidence that San Diego lawmakers would have adopted or would now adopt that cryptic, tax-based definition. What about hillside displays and cloth or plastic banners, for example, and signs painted on fences and on the walls of warehouses, barns, other buildings: Are they "rigidly assembled sign[s], display[s], or device[s] permanently affixed . . . or permanently attached" within the endorsed definition? Yet they seem to be "outdoor advertising display signs" within the meaning of the ordinance, and many of them would have some permanence. Also, what happens if a large rather than "a small sign placed in one's front yard" announces a political or religious message or a labor dispute? (Cf. the final sentence of the first paragraph in the majority's fn. 2.)

Those kinds of borderline issues do seem solvable, and thus I concur in the reversal of the judgment.

CLARK, Justice, dissenting.

I dissent. The San Diego ordinance unconstitutionally prohibits speech protected by the First Amendment. Because the ordinance must be considered a nullity, other issues are not reached.

The outdoor sign or symbol is a venerable medium for expressing political, social and commercial ideas. From the

poster or "broadside" to the billboard, outdoor signs have played a prominent role throughout American history, rallying support for political and social causes. (See Davidson, Propaganda and The American Revolution (1941) U.N.C. Press; Houck, Outdoor Advertising: History and Regulation (1969) U.Notre Dame Press.) The majority today call for absolute prohibition of this expression in violation of the First Amendment. (*Bates* v. *State Bar of Arizona* (1977) 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810; *Linmark Associates, Inc.* v. *Township of Willingboro* (1977) 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155; *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council* (1976) 425 U.S. 748, 96 S.Ct., 1817, 48 L.Ed.2d 346; *Bigelow* v. *Virginia* (1975) 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600; *Welton* v. *City of Los Angeles* (1976) 18 Cal. 3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119.)

The briefs before us reveal political, cultural and social messages on San Diego billboards that encourage the 55 mph speed limit and safety seatbelt; protest involvement in the United Nations and Vietnam; blast rising taxes; condemn assassination of the Israeli delegation to the Munich Olympic Games. All such communication is protected by the First Amendment. Commercial communication may be restricted by government only after considering informational value to the public, adequate alternative means for dissemination, and state interest. (*Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, supra,* 425 U.S. 748, 770, 96 S.Ct. 1817, 1829, 48 L.Ed.2d 346; *Ohralik* v. *Ohio State Bar Assn.* (1978) 436 U.S. 447, 455-456, 98 S.Ct. 1912, 1918-19, 56 L.Ed.2d 444.) But the issue before us is not scope of permissible regulation of commercial thought. By written stipulation the parties have agreed on the valuable content of materials

displayed on outdoor signs the ordinance would prohibit. The stipulation provides that plaintiffs' signs "are located in areas zoned for commercial and industrial purposes"; that outdoor advertising "produces numerous direct and indirect benefits to the public"; and that "[*v*]*aluable commercial, political and social information is communicated to the public through the use of outdoor advertising.* Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitively expensive." (Joint Stipulation of Facts Nos. 20, 28, *ante,* p. 514 of 164 Cal. Rptr., p. —— of —— P.2d; italics added.) As applied in this case, the ordinance clearly prohibits expression of political, social and commercial thought. The ordinance must therefore satisfy the most stringent rules flowing from the First Amendment.

In spite of the stipulation, and without scrutiny of the effect on protected speech, the majority grandly uphold the San Diego ordinance. The majority's withdrawal from this court's recent and unanimous decision in *Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119, by effectively ignoring it, is particularly significant and distressing.

Under a municipal ordinance not unlike that before us today, the City of Los Angeles prosecuted Mrs. Welton for sidewalk sale of maps revealing the homes of movie stars. When challenged as an invasion of Mrs. Welton's First Amendment rights, the city contended her commercial activity constituted unprotected speech. In holding the ordinance could not be constitutionally applied to Mrs. Welton, we stated: "The fact that some may view the map as lacking opinion, newsworthiness or information of social worth, is constitutionally irrelevant. . . . Mrs. Wel-

ton and her maps are entitled to the same First Amendment protection as the political candidate and his political pamphlet." (*Id.*, at p. 504, 134 Cal.Rptr. at p. 671, 556 P.2d at p. 1122.)

Using both stale and distinguishable cases, the majority attempt to justify the ordinances' blanket prohibition by claiming (1) outdoor signs are not entitled to the same protection as other speech, (2) governmental interests here outweigh any First Amendment interest involved, and (3) "probable" alternative means exist for plaintiffs to communicate public messages.

Cases cited by the majority *predating* recognition of First Amendment protection of commercial speech, upholding zoning ordinances prohibiting off-site billboards, are of no precedential value. Those cases assumed commercial communication lacks First Amendment protection and failed to recognize signs might be used for noncommercial messages. (See, *Markham Advertising Co.* v. *State* (1968) 73 Wash.2d 405, 429, 439 P.2d 248; *Murphy, Inc.* v. *Westport* (1944) 131 Conn. 292, 302, 40 A.2d 177; *Matter of Cromwell* v. *Ferrier* (1967) 19 N.Y.2d 263, 270, 279 N.Y.S.2d 22, 27, 225 N.E.2d 749, 753; *Howard* v. *State Dept. of Hwys. of Colorado* (10th Cir. 1973) 478 F.2d 581, 584; *United Advertising Corp.* v. *Borough of Raritan* (1952) 11 N.J. 144, 152, 93 A.2d 362.)

Further, cases relied on by the majority decided following recognition of First Amendment protection of commercial speech (see, *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, supra,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346; *Bigelow* v. *Virginia, supra,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600) are clearly distinguishable from the case at bench.

Contrary to majority assertion (*ante,* pp. 520-521 of 164 Cal.Rptr., pp. 417-418 of 610 P.2d), *Suffolk Outdoor Advertising Co., Inc.* v. *Hulse* (1977) 43 N.Y.2d 483, 402 N.Y.S.2d 368, 373 N.E.2d 263, does not resolve the issue of whether the San Diego ordinance violates the First Amendment. Examination of *Suffolk* reveals the New York Court of Appeals devoted a scant paragraph to the First Amendment, summarily determining the ordinance in question was not a regulation based on content, and operative alternative means such as accessory or on-premise billboards existed for outdoor advertising. *Suffolk* does not deal with the issue of whether the ordinance curtailed noncommercial thought similar to the communication stipulated to in this case, so does not examine the availability of adequate alternatives. Thus, while of some precedential value on the issue of permissible regulation of commercial ideas, *Suffolk* does not address the critical issue faced by this court: whether noncommercial as well as commercial speech can be constitutionally restricted in the manner provided in the ordinance.[1]

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[1] The majority view the Supreme Court dismissal of appeal in *Suffolk* as indicating that court's approval of the prohibition of off-site billboards. (*Ante,* p. 517 of 164 Cal.Rptr., p. 414 of 610 P.2d; citing *Hicks* v. *Miranda* (1975) 422 U.S. 332, 343-345, 95 S.Ct. 2281, 45 L.Ed.2d 223.)

The majority's one-paragraph analysis of *Suffolk* (*ante,* pp. 520-521 of 164 Cal.Rptr., pp. 417-418 of 610 P.2d) based on only a one-line Supreme Court order, itself based on a one-paragraph discussion by the New York Court of Appeals summarily determining there are adequate alternatives while focusing only on advertising alternatives, is not the type of close scrutiny mandated by the First Amendment in limiting speech.

Further, summary dismissals are of only limited precedential value and do not carry the full weight of a Supreme Court ruling after full briefing and argument and certainly do not endorse any matter not considered by the opinion below. (*Washington* v. *Confederate Bands and Tribes* (1979) 439 U.S. 463, 477, fn. 20, 99 S.Ct. 740, 749, 58 L.Ed.2d 740.)

Other cases relied on by the majority, while upholding banning of billboards, exempt noncommercial messages from the ban. (*John Donnelly & Sons* v. *Mallar* (1978) 453 F.Supp. 1272, 1280; *Donnelly & Sons, Inc.* v. *Outdoor Advertising Board* (1975) 369 Mass. 206, 339 N.E.2d 709, 721; *Newman Signs* v. *Hjelle* (1978) 268 N.W.2d 741, 760-762.) Such cases have no precedential value when, as here, the ordinance includes noncommercial thought.

Still other cases relied on by the majority uphold restrictions on billboards because they were banned only in one area but permitted in other areas of the community. (*Donnelly Advertising Corp.* v. *City of Baltimore* (1977) 279 Md. 660, 370 A.2d 1127, 1132 (urban renewal ordinance banning billboards only in the renewal area of the city); *Lubbock Poster Co.* v. *City of Lubbock* (Tex.Civ.App. 1978) 569 S.W.2d 935, 945 (ordinance did not totally prohibit billboards but rather regulated only the location, size, separation and height); *State* v. *Lotze* (1979) 92 Wash.2d 52, 593 P.2d 811, 813 (Washington State Advertising Control Act prohibited billboards along scenic highways but permitted them in commercial and industrial areas).) In contrast, the San Diego ordinance constitutes a total ban on all off-site billboards anywhere in the City of San Diego.

Billboards Are Entitled to the Same First Amendment Protection as Other Forms of Speech

First Amendment protection extends to virtually all media utilized to disseminate ideas. (*Erzoznik* v. *City of Jacksonville* (1974) 422 U.S. 205, 95 S.Ct. 2268, 45 L.E. 2d 125 (drive-in movies); *Police Department of Chicago* v. *Mosley* (1972) 408 U.S. 92, 92 S.Ct. 2286, 33 L.Ed.2d 212 (picketing); *Schneider* v. *State* (1939) 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (leafletting); *Welton* v. *City of*

Los Angeles, supra, 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119 (roadside sale of maps); *Dulaney* v. *Municipal Court* (1974) 11 Cal.3d 77, 112 Cal.Rptr. 777, 520 P.2d 1 (posting signs on public utility poles); *Dillon* v. *Municipal Court* (1971) 4 Cal.3d 860, 94 Cal.Rptr. 777, 484 P.2d 945 (demonstrations and parades); *Wollam* v. *City of Palm Springs* (1963) 59 Cal.2d 276, 29 Cal.Rptr. 1, 379 P.2d 481 (sound trucks); *California Newspaper Publishers Assn., Inc.* v. *City of Burbank* (1975) 51 Cal.App.3d 50, 123 Cal. Rptr. 880 (newspaper racks).) "The right of free speech necessarily embodies the means used for its dissemination because the right is worthless in the absence of a meaningful method of its expression. To take the position that the right of free speech consists merely of the right to be free from censorship of the content rather than any protection of the means used, would, if carried to its logical conclusion, eliminate the right entirely." (*Wollam* v. *City of Palm Springs, supra,* 59 Cal.2d 276, 284, 29 Cal. Rptr. 1, 6, 379 P.2d 481, 486.)

In addressing their first basis in justification of the San Diego ordinance's blanket prohibition—outdoor signs are not entitled to the same protections as other forms of speech—the majority attempt to distinguish outdoor signs from "other forms of communication which courts have held can be subjected only to narrowly drawn regulations serving a compelling governmental interest" (e. g., leafletting, sound trucks, etc.) because an outdoor sign is a "large, immobile and permanent structure" as opposed to "more transitory [and] less obtrusive media." (*Ante,* p. 522 of 164 Cal.Rptr., p. 419 of 610 P.2d.) Such distinction suffers the same overbreadth as the ordinance itself. While the ordinance may seek to prohibit small, unobtrusive *off-site* signs, it permits obtrusive and perhaps even

offensive *on-site* billboards. Being equally inconsistent, the majority selectively sustain the prohibition of "offensive" billboards but support the use of sound trucks, picketing, leafletting and demonstrations as constituting "more transitory or less obtrusive media."

Obtrusiveness does not justify total prohibition of protected expression. In *Erzoznik* v. *City of Jacksonville supra,* 422 U.S. 205, 95 S.Ct. 2268, 45 L.Ed.2d 125, the Supreme Court struck down a city ordinance prohibiting exhibition of a motion picture displaying the bare female body by a drive-in theater whose screen was visible from a public street. Off-site advertising hardly commands the same attention as the "unique type of eye-catching display" of an animated drive-in movie (*id.,* at p. 222, 95 S.Ct. at p. 2279; Burger, C. J., dis.), yet the court noted "the screen of a drive-in theater is not 'so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.'" (*Id.,* at p. 212, 95 S.Ct. at p. 2274.)

Obtrusiveness is thus measured by not only quality or degree of offensive intrusion, but also by the ability of the offended to avoid it. Is it not fair to assume that a display of animated nudes on a screen constitutes an intrusion of greater degree than a motionless sign or symbol advertising some product? Yet the Supreme Court did not find the nude display so offensive that its effect could not be kept within permissible limits. Off-site displays also are not so offensive that they cannot be kept within reasonable limits.

While obtrusiveness may be a factor to be weighed in the balance in determining whether a restriction is reasonable as to time, place and manner, the majority fail to even attempt a balance. Rather, they use obtrusiveness as a sole reason, a la Ogden Nash, for the blanket ban on billboards.

In instances when obtrusiveness has been deemed a factor justifying billboard regulation, the courts were persuaded by other considerations, such as the discredited view that the Constitution did not protect commercial speech, or that only those billboards next to interstate and state highways should be banned. (*General Outdoor Advertising Co.* v. *Department of Public Works* (1935), 289 Mass. 149, 193 N.E. 799, 803-804, 814; *Markham Advertising Co.* v. *State* (1968) 73 Wash.2d 405, 428-429, 439 P.2d 248.) In this case, obtrusiveness must be balanced against constitutional protection given noncommercial as well as commercial uses of billboards, and the total ban of the San Diego ordinance. These factors compel the conclusion the ordinance is overbroad, constituting an impermissible infringement on First Amendment protections.

GOVERNMENTAL INTERESTS DO NOT JUSTIFY THE ORDINANCE'S INFRINGEMENT ON FIRST AMENDMENT RIGHTS

The majority assert as their second justification for blanket prohibition that the balance must be tilted in favor of governmental interests, resulting in imbalance.

While recognizing that aesthetic beauty and traffic safety are legitimate police power objectives, the majority fail to show these interests outweigh First Amendment rights of plaintiffs, advertisers and the viewing public.[2] The conflict between police powers on the one hand and First Amendment rights on the other must seek compromise, allowing government to reasonably regulate the time, place

[2] It is well-settled that the right to receive "information of potential interest and value" is protected by the First Amendment. (*Bigelow* v. *Virginia, supra,* 421 U.S. 809, 822, 95 S.Ct. 2222, 2232, 44 L.Ed.2d 600; see also, *Stanley* v. *Georgia* (1969) 394 U.S. 557, 564, 89 S.Ct. 1243, 1247, 22 L.Ed.2d 542.)

and manner in which First Amendment rights may be exercised. (*Grayned* v. *City of Rockford* (1972) 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222; *Healy* v. *James* (1972) 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed.2d 266; *Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119; *Burton* v. *Municipal Court* (1968) 68 Cal.2d 684, 68 Cal.Rptr. 721, 441 P.2d 281; *Wollam* v. *City of Palm Springs, supra,* 59 Cal.2d 276, 29 Cal.Rptr. 1, 379 P.2d 481.) Thus government may validly regulate the use of newsracks (*Kash Enterprises, Inc.* v. *City of Los Angeles* (1977) 19 Cal.3d 294, 138 Cal.Rptr. 53, 562 P.2d 1302), sound trucks (*Kovacs* v. *Cooper* (1949) 336 U.S. 77, 69 S.Ct. 448, 93 L.Ed. 513), street sales of goods or merchandise (*Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119), and the operation of "adult" movie theaters (*Young* v. *American Mini Theatres* (1976) 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310). Similarly, off-site advertising signs may be reasonably regulated.

Notwithstanding the state's power to regulate, such power "does not necessarily sanction the outright prohibition." (*Wollam* v. *City of Palm Springs, supra,* 59 Cal.2d 276, 284, 29 Cal.Rptr. 1, 6, 379 P.2d 481, 486.) To be constitutionally reasonable, regulation of time, place or manner must be written narrowly and explicitly, in furtherance of a legitimate police power purpose. (*Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119.) But here the majority push police power objectives so far from center balance as to abolish protected speech. The *absolute prohibition* of off-site signs is justified by neither community appearance nor traffic improvement. Furthermore, the ordinance—written in terms of total prohibition—is not susceptible to interpre-

tation avoiding constitutional infirmity. (See *Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119.)

Further, in support of the conclusion that the city's interest in regulating commercial use of property justifies the instant ordinance the majority mistakenly rely on *Young* v. *American Mini Theatres, supra,* 427 U.S. 50, 96 S.Ct. 2440, 49 L.Ed.2d 310. While upholding a zoning ordinance restricting the location of "adult" theaters, *Young* was careful to observe the First Amendment protection of such communication from total suppression. While *Young* affirms the proposition that commercial speech acquires a lesser degree of constitutional protection than other more traditionally protected varieties of thought (*id.,* at p. 68, 96 S.Ct. at p. 2451. *Ohralik* v. *Ohio State Bar Assn., supra,* 436 U.S. 447, 455-456, 98 S.Ct. 1912, 1918-19, 56 L.Ed.2d 444), the statute was upheld in part because it did not completely ban theaters from the city. Instead, theaters were restricted to areas more than 500 feet beyond residential areas and 1,000 feet beyond other adult establishments. In contrast, the San Diego ordinance bans billboards altogether.

Adequate Alternative Means of Dissemination of Speech Are Not Available

The third purported justification urged by the majority in support of the ordinance—existing "adequate alternative means" for advertisers to communicate their ideas—is likewise without merit. The parties' stipulation establishes that the ordinance will eliminate outdoor advertising, that outdoor advertising benefits the public in numerous ways,

and that politicians and others rely on outdoor advertising because other forms of advertising are "insufficient, inappropriate and prohibitively expensive." (See Joint Stipulation of Facts Nos. 2 and 28, *ante,* p. 514 of 164 Cal.Rptr., p. 411 of 610 P.2d.) Thus, in numerous situations, including the delivery of political messages, traditional off-site advertising is the only practical means of communicating.

The majority further rely on *John Donnelly & Sons* v. *Mallar, supra,* 453 F.Supp. 1272, as support for the proposition that alternative means of communicating such as on-premise advertising, official business directional signs, tourist information centers and publications justify the ordinance's prohibition against outdoor advertising. However, *Mallar* is limited to a ban on only *commercial* billboards: ". . . noncommercial messages such as those conveyed by political, civic and charitable signs, are specifically exempted from the broad ban on off-premises advertising." (*Id.,* at p. 1280.) *Mallar's* holding that existing alternatives justified a ban on commercial speech, while specifically exempting noncommercial messages from that holding, forecloses any argument that such alternatives would justify a ban on noncommercial messages as proposed by the broad San Diego billboard ban.

Recognizing freedom of speech entails not only communication, but effective communication, courts have refused to impose absolute prohibition of a medium when there exists no practical alternative. In our recent case of *Welton* v. *City of Los Angeles, supra,* 18 Cal.3d 497, 134 Cal.Rptr. 668, 556 P.2d 1119, we unanimously invalidated on First Amendment grounds an ordinance banning sidewalk and parkway sales of commercial books, magazines,

maps, and other constitutionally protected material despite readily apparent alternative methods of distribution. We noted the "city has failed to demonstrate that such a broad prohibition is necessary to the attainment of a legitimate police power purpose. Its interest in abating public nuisance cannot be pursued by means infringing personal liberties when less restrictive alternatives are available." (*Id.* at pp. 507-508, 134 Cal.Rptr. at p. 674, 556 P.2d at p. 1125.) In *Wollam* v. *City of Palm Springs, supra,* 59 Cal.2d 276, 29 Cal.Rptr. 1, 379 P.2d 481, we held unconstitutional an ordinance prohibiting use of stationary sound trucks where other methods including moving sound trucks were available. Similarly, in *Linmark Associates, Inc.* v. *Township of Willingboro, supra,* 431 U.S. 85, 97 S.Ct. 1614, 52 L.Ed.2d 155, the Supreme Court rejected a contention that because ample alternative methods of communication existed, an ordinance prohibiting the posting of real estate "For Sale" and "Sold" signs should be sustained.[3]

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[3] The majority's statement that the "possibility that the ordinance may impede an occasional advertiser from communicating his message to the public, however, is not sufficient to invalidate the ordinance *on its face*" (*ante*, p. 522, fn. 14 of 164 Cal.Rptr., p. 419, fn. 14 of 610 P.2d), ignores both the joint stipulation of facts by which we are bound and traditional First Amendment overbreadth analysis. The parties' stipulation that many advertisers rely exclusively on outdoor advertising provides more than mere "possibility" that communication will be impeded. Furthermore, while the overbreadth doctrine may not apply with the same force in situations involving commercial speech (see *Bates* v. *State Bar, supra,* 433 U.S. 350, 380, 97 S.Ct. 2691, 2707, 53 L.Ed.2d 810), the instant ordinance affects social and political expressions as well as commercial speech. It is apparent, for instance, that political expression will be significantly curtailed although political campaign posters are authorized. The restriction to temporary signs, less efficient in terms of cost and effectiveness than the prohibited large and permanent display structures whose costs can be depreciated over long periods, will work to the detriment

There being no basis upon which the absolute prohibition of outdoor advertising can be justified, the judgment should be affirmed.

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of "the poorly financed causes of little people" (*Martin* v. *Struthers* (1943) 319 U.S. 141, 146, 63 S.Ct. 862, 865, 87 L.Ed. 1313), whose proponents are unable to afford other more costly mass media advertising.

APPENDIX B

Order Denying Rehearing

L.A. No. 30782

May 14, 1980

METROMEDIA, INC., et al.,

v.

CITY OF SAN DIEGO, et al.

Opinion modified.

Appellants' petition for rehearing DENIED.

/s/ BIRD
Chief Justice

APPENDIX C

Vacated Opinion of the Court of Appeal

JUDGE RICHARD B. AULT

February 11, 1977

METROMEDIA, INC., et al.,

Plaintiffs and Respondents,

v.

CITY OF SAN DIEGO, et al.,

Defendants and Appellants.

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4 Civ. No. 14591

(Sup. Ct. Nos. 332881
& 333292)

This appeal raises issues concerning the constitutionality of a city ordinance which prohibits the erection and maintenance of all off-premise advertising displays within the entire limits of a large metropolitan city. The validity of such sweeping legislation in this area has not been considered by an appellate court in California since 1909 (see *Varney & Green* v. *Williams,* 155 Cal. 318).

The City of San Diego appeals from a summary judgment declaring City Ordinance No. 10795 (New Series) unconstitutional and permanently enjoining the City from taking any steps to enforce the ordinance.[1] Separate actions

[1] Two sections of the ordinance were excepted from the judgment. These sections created special sign control districts in areas

attacking the ordinance by respondents Metromedia, Inc. and Pacific Outdoor Advertising, Inc. had been consolidated by stipulation. After extensive interrogatories and requests for admissions had been answered, all parties moved for summary judgment based upon a joint stipulation of facts, the pleadings and papers filed, and matters subject to judicial notice.

The respondent companies are engaged in the outdoor advertising business. Each of them owns a substantial number of outdoor advertising signs in San Diego which were lawfully erected and which have a substantial market value. On March 14, 1972 the San Diego City Council adopted Ordinance No. 10795 (New Series). As it relates to and affects respondents' businesses, the ordinance cuts a wide swath, prohibiting *all* off-premise outdoor advertising displays within the City and providing for the abatement of *all* such existing advertising displays over a four-year period.

Generally expressing the intent to promote safety, economic, aesthetic and general welfare interests, the ordinance first declares:

"A. Purpose and Intent

"It is the purpose of these regulations to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to ensure that signing is used as identification and not as advertisement; and to pre-

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of the City known as La Jolla and Rancho Bernardo and regulated on-premise signs in those areas. They are not involved in this dispute.

serve and improve the appearance of the City as a place in which to live and work.

"It is the intent of these regulations to protect an important aspect of the economic base of the City by preventing the destruction of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions; to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare."

The ordinance next prohibits all outdoor advertising display signs in the City except signs which designate the owner or occupant of the premises upon which a sign is placed, identifying such premises or advertising goods manufactured or produced or services rendered on the premises upon which a sign is placed. Existing signs which do not meet the requirements of the ordinance are declared nonconforming, and the ordinance provides for the abatement of all such signs, based upon an adjusted market value. Under the ordinance the adjusted market value of a sign is computed upon the basis of its original cost, less ten percent of the original cost for every year a sign has been standing.

The abatement schedule provided in the ordinance is as follows:

"Adjusted Market Value		Abatement Date
Less than	$500.00	April 1, 1973
$ 500.00 to	999.99	July 1, 1973
1,000.00 to	1,499.99	October 1, 1973
1,500.00 to	1,999.99	January 1, 1974

2,000.00 to	2,999.99	April 1, 1974
3,000.00 to	3,999.99	July 1, 1974
4,000.00 to	4,999.99	October 1, 1974
5,000.00 to	7,499.99	January 1, 1975
7,500.00 to	9,999.99	April 1, 1975
10,000.00 to	12,499.99	July 1, 1975
12,500.00 to	14,999.99	October 1, 1975
15,000.00 to	19,999.99	January 1, 1976
20,000.00	and over	April 1, 1976"

Irrespective of adjusted market value, the ordinance requires the removal of all off-premise signs which can be viewed from a freeway, parkway or scenic highway within 90 days of its effective date. The ordinance makes no provision for compensation to the owners of the signs it requires to be removed.

The written stipulation of facts filed in the superior court was prefaced with this recital:

> "The parties to this litigation are filing cross-motions for summary judgment. This Stipulation of Facts is entered into for the purpose of these motions and for any judgment thereon or appeals therefrom and for no other purpose. The parties agree that the facts specified herein are true for said purpose only and none of the parties hereto shall be bound thereby for any other purpose."

The following pertinent facts (as originally numbered) were set forth in the written stipulation:

> '2. If enforced as written, Ordinance No. 10795 will eliminate the outdoor advertising business in the City of San Diego.

"13. Each of the plaintiffs are the owners of a substantial number of outdoor advertising displays (approximately 500 to 800) in the City of San Diego.

"14. Substantially all of the displays owned by plaintiffs are located on property leased by the owners thereof to the plaintiffs for the purposes of maintaining outdoor advertising displays thereon.

"15. Each of the displays were legally erected in full compliance with all applicable municipal and state laws and are in full compliance with such laws except for the contested legality of Ordinance No. 10795.

"16. The cost of producing and erecting each display was substantial.

"17. The displays have varying values depending upon their size, nature and location.

"18. Each of the displays has a fair market value, as a part of an income-producing system, of between $2,500 and $25,000.

"19. Each display has a remaining useful income-producing life in excess of 25 years.

"20. All of the signs owned by plaintiffs in the City of San Diego are located at areas zoned for commercial and industrial purposes.

"28. Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of outdoor advertising. Many businesses and politicians and other persons rely upon outdoor advertising

because other forms of advertising are insufficient, inappropriate and prohibitively expensive.

"29. Enforcement of Ordinance No. 10795, in addition to eliminating outdoor advertising within the City of San Diego, will adversely affect plaintiffs' businesses outside the City of San Diego in that many national or state-wide advertisers will be inclined to select other media capable of communicating with a wider segment of the consuming public, including San Diego, rather than selecting outdoor advertising which would be unable to communicate with the citizens of San Diego.

"31. Many of the plaintiffs' signs are within 660 feet and others are within 500 feet of Interstate or Federal Aid Primary highways and are designed to be viewed therefrom.

"34. 'The amortization provisions' of Ordinance No. 10795 have no reasonable relationship to the fair market value, useful life or income generated by the signs and were not designed to have such a relationship."

In their motion for summary judgment, respondents attacked the ordinance on seven grounds. The same issues are argued on appeal.

1. Is the ordinance an improper exercise of the police power?
2. Does the ordinance deprive respondents of their property without due process of law and without payment of just compensation as required by the Federal and California Constitutions?
3. Does the ordinance deny equal protection of the law?

4. Does the ordinance violate First Amendment guarantees of freedom of speech?
5. Is the ordinance invalid due to a conflict with or preemption by federal and state legislation?
6. Is the abatement schedule provided in the ordinance unconstitutional?
7. Is the ordinance invalid because of the City's failure to comply with the California Environmental Quality Act?

Before entering its judgment invalidating the ordinance and enjoining its enforcement, the trial court filed and entered its written Memorandum of Intended Ruling. Reference to the memorandum indicates the trial court predicated its judgment on two grounds: first, the ordinance was an unreasonable exercise of the police power; and, second, the ordinance violated First Amendment guarantees of freedom of speech.

Is Ordinance No. 10795 an Unreasonable Exercise of the Police Power?

Article XI, section 7, of the California Constitution expressly confers on cities and towns the power to make and enforce within their limits all local, police, sanitary and other ordinances and regulations not in conflict with the general laws. This power is as broad as that possessed by the Legislature itself where it is exercised within the confines of the City and is not in conflict with the state's general laws (*In re Maas,* 219 Cal. 422, 425; *Carlin* v. *City of Palm Springs,* 14 Cal. App. 3d 706, 711).

Within this grant of authority, local governments may promulgate zoning ordinances which regulate and restrict

land use. The power to enact and enforce such measures is inherent in the police power (*People* v. *Johnson,* 129 Cal. App. 2d 1, 5). It has long been recognized that the reasonable regulation of signs and billboards constitutes a valid exercise of the police power (*Carlin* v. *City of Palm Springs, supra,* 14 Cal. App. 3d 706, 712; *Metromedia, Inc.* v. *City of Pasadena,* 216 Cal. App. 2d 270, 273-274; *National Advertising Co.* v. *County of Monterey,* 211 Cal. App. 2d 375, 378).

While the legislative body of a city has broad discretion in determining what is reasonable in endeavoring to protect the health, safety, morals and general welfare of its citizens, the ordinances it enacts to accomplish these aims must be reasonable in object and not arbitrary in operation, for counterbalancing the public right is a property owner's right to make reasonable use of his property and the businessman's right to engage in lawful business (*Carlin* v. *City of Palm Springs, supra,* 14 Cal. App. 3d 706, 711-713). When reviewing legislation, challenged as an improper or unreasonable exercise of the police power, courts must be mindful that they are examining the act of a coordinate branch of the government, and the legislative power must be upheld "unless manifestly abused so as to infringe on constitutional guarantees." (*City of Los Angeles* v. *Gage,* 127 Cal. App. 2d 442, 451.)

Initially we reject, as did the trial court, respondents' claim the ordinance is invalid because it was enacted primarily to accomplish aesthetic purposes. In making this assertion respondents rely heavily on *Varney & Green* v. *Williams, supra,* 155 Cal. 318, a 1909 case in which the Supreme Court held, among other things, that aesthetic considerations *alone* do not justify the exercise of the police power to eliminate outdoor advertising displays.

As the City and its amici point out, *Varney & Green* was decided before the acceptance of comprehensive zoning as a valid exercise of the police power. Later California decisions have distinguished the earlier case by recognizing the inseparable interrelationship between aesthetic and economic considerations, holding that the combination of these and other similar factors may properly influence city officials in enacting measures affecting billboard advertising displays (*City of Escondido* v. *Desert Outdoor Advertising, Inc.*, 8 Cal. 3d 785, 790; *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino*, 255 Cal. App. 2d 765, 769).

Here the stated, as well as the obvious, purpose of the ordinance was to promote highway safety and to secure economic benefits for the community, as well as to enhance community aesthetic values. The ordinance cannot be invalidated on the ground it was enacted solely or primarily for aesthetic purposes.

Our chief concern with the ordinance lies in its broad sweep. No California appellate decision has approved a municipal ordinance which prohibits all outdoor off-premises advertising displays throughout the entire area of a city. To the contrary, in *Varney & Green* v. *Williams, supra*, 155 Cal. 318, the only case considering an ordinance absolutely prohibiting the erection or maintenance of billboards for advertising purposes within the town limits, the Supreme Court held the ordinance invalid, stating in conclusion:

> "We are not here, however, concerned with the extent to which the legislative power may, in the effort to protect the public safety or morals, regulate the manner of erecting or using bill-boards. The ordinance in question does not attempt such regulation, but undertakes to absolutely forbid the erection or maintenance

> of any bill-board for advertising purposes. We have no doubt that this sweeping prohibition was beyond the power of the town trustees." (*Varney & Green* v. *Williams,* 155 Cal. 318, 321.)

The City asserts the holding of *Varney & Green* invalidating an ordinance totally prohibiting billboards as beyond the power of municipal authorities is no longer controlling. It again points out the case was decided before there was judicial acceptance of comprehensive zoning and that automobile traffic and urban congestion have vastly increased since 1909. Furthermore, the City contends the case was decided on the ground the ordinance involved was based solely on aesthetic considerations and that it has been distinguished by later California decisions.

Our reading of *Varney & Green* leads us to the conclusion the ordinance under consideration there was invalidated for two reasons: (1) because it was based solely on aesthetic considerations; and (2) because it did not attempt the regulation of billboards, but rather undertook "to absolutely forbid the erection or maintenance of any bill-board for advertising purposes." While, as we have pointed out, later California cases may be said to have modified the strict holding of *Varney & Green* as it relates to aesthetic considerations, none has sought to undercut its holding that a total ban on billboards for advertising purposes is beyond the power of municipal authorities. In *City of Escondido* v. *Desert Outdoor Advertising, Inc., supra,* 8 Cal. 3d 785, the ordinance in question prohibited all signs and advertising displays adjacent to freeways. In upholding the validity of the ordinance, the Supreme Court stated:

> "Moreover, City's ordinance does not purport to prohibit all signs and advertisements but only to regulate

> their location so that they do not constitute nuisances and for the obvious purposes of promoting highway safety as well as enhancing community aesthetic values. The case of *Varney & Green* v. *Williams,* 155 Cal. 318 . . ., is readily distinguishable. There the court held invalid an ordinance which forbade all advertising billboards within city limits. (See also *Metromedia, Inc.* v. *City of Pasadena,* 216 Cal. App. 2d 270, 273-274 . . . .)"

It is significant that the court in no way questioned its earlier holding but rather distinguished the limited regulatory aspect of the ordinance under consideration from the all-inclusive prohibitory features of the ordinance its earlier decision had condemned.[2]

Irrespective of the holding in *Varney & Green,* additional considerations compel us independently to conclude that the City's ordinance banning all off-premise outdoor advertising within its boundaries exceeds constitutional limits. In enacting and attempting to enforce Ordinance No. 10795, the City purports to act under its police power. It concedes the enforcement of the ordinance will eliminate the outdoor advertising business in the City of San Diego and will require respondents to remove hundreds of advertising display signs having a fair market value of millions of dollars,

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[2] Courts in other jurisdictions which have considered municipal ordinances totally banning outdoor advertising displays within the entire limits of a city have found such ordinances to be an unreasonable and arbitrary exercise of the police powers (cf. *Combined Communications Corporation* v. *City & Cty. of Denver,* 542 P. 2d 79 (Colo. 1975); *Norate Corporation* v. *Zoning Board of Adjustment,* 207 A. 2d 890 (Pa. 1965); *Daikeler* v. *Zoning Bd. of Adjust. of Montgomery Tp.,* 275 A. 2d 696 (Pa. 1971); *General Advertising Company* v. *City of Ann Arbor,* 218 N.W. 2d 27 (Mich. 1974).

all of which are located in commercial and industrial zones of the City, without payment of compensation.

The legitimate exercise of the police power does not run afoul of due process, and the fact that an individual, or his business or property, may sustain damage as the result of its proper exercise to protect the health, safety, morals and general welfare of the community does not entitle him to compensation. Damage brought about through the proper exercise of the police power is merely one of the prices an individual must pay as a member of society (*City of Los Angeles* v. *Gage, supra,* 127 Cal. App. 2d 442, 452-453).

While the grant empowering cities to exercise the police power is broad and has been uniformly interpreted by the courts to include the right to reasonably regulate outdoor advertising displays within their boundaries, it is not without limitation. Their power to enact and enforce ordinances in the exercise of the police power is limited to those ordinances which do not conflict with the general laws of the state (Cal. Const., art XI, §7).

In Business and Professions Code section 5226, the Legislature has stated:

> "The regulation of advertising displays adjacent to any interstate highway or primary highway as provided in Section 5405 is hereby declared to be necessary to promote the public safety, health, welfare, convenience and enjoyment of public travel, to protect the public investment in such highways, to preserve the scenic beauty of lands bordering on such highways, and to insure that information in the specific interest of the traveling public is presented safely and effectively, recognizing that a reasonable freedom to advertise is necessary to attain such objectives. The Legislature finds:

"(a) Outdoor advertising is a legitimate commercial use of property adjacent to roads and highways.

"(b) Outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to exist in business areas, subject to reasonable controls in the public interest."

Business and Professions Code section 5226 is a part of the Outdoor Advertising Act (Bus. & Prof. Code §5200 et seq.). Generally, the provisions of the act apply only to the unincorporated areas of the state:

". . . except that the placing of advertising displays within 660 feet from the edge of the right-of-way of, and the copy which is visible from, interstate highways or primary highways, *including the portions of such highways located in incorporated areas, shall be governed by this chapter.*" (Emphasis added.) (Bus. & Prof. Code §5271.)

The City has stipulated that many of respondents' signs are located within 660 feet of such highways in the City and that they are designed to be viewed from such highways. It has further stipulated that all of respondents' signs are located in areas zoned for commercial or industrial purposes. To the extent the City's ordinance completely bans and requires removal of all such signs, it is directly in conflict with Business and Professions Code section 5226, which states such signs ". . . should be allowed to exist, subject to reasonable controls in the public interest." [3]

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[3] Contrary to the City's contention, Business and Professions Code section 5230 does not operate to authorize its *total* ban of

Moreover, signs which abut interstate and primary highways are of state-wide concern because of their effect upon the state's right to federal highway funds. Undoubtedly the paramount legislative purpose prompting the California Legislature to enact the Outdoor Advertising Act was its concern not to lose California's share of federal highway funds and not to incur any penalty as a result of noncompliance with the Federal Highway Beautification Act (23 U.S.C. §131, et seq.). Under the Act a state must enact laws providing "effective control" of billboards or be subject to a penalty of 10% of its allocated federal highway funds during each year of noncompliance (23 U.S.C. §131(b)). Section 131(g) of the Act provides that just compensation shall be paid upon removal of any outdoor advertising sign, display, or device lawfully erected under state laws. Section 131(b)'s requirement that states provide "effective control" undoubtedly includes section 131(g)'s mandate for payment of "just compensation." (See 55 Ops. Atty. Gen. 1.) Thus enforcement of the City's ordinance requiring the removal of signs in this category without payment of compensation might well subject the State of California to the loss of 10% of the funds allocated by the federal government for highway construction purposes.

Equally as important as the considerations discussed above, and of broader impact, is the conceded fact that enforcement of the ordinance will eliminate the outdoor advertising business in the City of San Diego. A municipality's power to regulate lawful businesses may not be used

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advertising display signs. That section merely authorizes cities and counties to impose *restrictions* on such signs, equal or greater than those imposed by the Outdoor Advertising Act itself.

to eliminate them entirely *(City of Escondido* v. *Desert Outdoor Advertising, Inc., supra,* 8 Cal. 3d 785, 790; *Parker* v. *Colburn,* 196 Cal. 169, 176). This rule does not apply to a business whose operation constitutes a nuisance, inimical to the public welfare *(City of Escondido* v. *Desert Outdoor Advertising, Inc., supra,* 8 Cal. 3d 785, 790; *Sunset Amusement Co.* v. *Board of Police Commissioners,* 7 Cal. 3d 64, 80). Although the ordinance in question does not declare signs which violate its provisions to be a nuisance, the City seeks to come within the exception to the general rule by invoking another provision of its municipal code which declares all property uses in violation of code provisions to be public nuisances.

If the interrelation of the code sections has the effect of constituting signs in violation of the ordinance in question as nuisances, such a declaration would still be subject to the constitutional protection against unreasonable and arbitrary action on the part of the City (*People ex rel. Dept. Pub. Wks.* v. *Adco Advertisers,* 35 Cal. App. 3d 507, 519). The City's contention it may declare *all* outdoor advertising signs, no matter where located within its limits, to be nuisances, inimical to the public welfare, flies directly in the face of the contrary findings by the Legislature in Business and Professions Code section 5226 that:

> "(a) Outdoor advertising is a legitimate commercial use of property adjacent to roads and highways.
>
> "(b) Outdoor advertising is an integral part of the business and marketing function, and an established segment of the national economy, and should be allowed to exist in business areas, subject to reasonable controls in the public interest."

Appendix C—Vacated Opinion of the Court of Appeal

A business may be inherently lawful and still subject to regulation under the police power, but when a lawful business is regulated, and certainly where it is prohibited, it is a judicial question whether the law or ordinance is a lawful exercise of the police power (*McKay Jewelers, Inc.* v. *Bowron,* 19 Cal. 2d 595, 600). Here, we are not dealing with an ordinance which regulates or prohibits a few signs, or which affects only signs located in certain zones or areas of the City. Enforcement of the ordinance in question will require the removal of hundreds of signs having a conceded value in the millions of dollars. The facts before us indisputably show enforcement of the ordinance will bring about substantial private loss. While the stated purposes of the ordinance may be laudable, the City presents no convincing argument why the public benefits sought cannot be achieved by more reasonable and less drastic measures. The stipulated facts simply do not support the proposition that all off-premise advertising signs within the City are public nuisances, or that it is reasonably necessary to remove all of them to promote safety, general economic interests, or even aesthetic values. The ordinance is too broad, too general and too inclusive. We have no doubt the enactment ot the ordinance and its attempted enforcement is beyond the power of city officials and constitutes an unreasonable and arbitrary exercise of the police power.

This holding requires us to affirm the superior court's judgment and makes it unnecessary to consider whether the broad sweep of the ordinance also infringes upon First Amendment or Equal Protection rights or whether its a nortization provisions meet constitutional standards.

The judgment is affirmed.

APPENDIX D

Memorandum of Intended Ruling of the Superior Court

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

JUDGE JACK R. LEVITT

May 27, 1975

No. 332881

METROMEDIA, INC., a corporation doing business as FOSTER AND KLEISER,

Plaintiff,

vs.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Defendants.

No. 333292
Consolidated

PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Plaintiff,

vs.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Defendants.

Plaintiff Pacific United Services Corporation has filed a complaint seeking declaratory relief and a temporary restraining order. Plaintiff Metromedia, Inc. has filed a com-

plaint seeking declaratory relief and a permanent injunction. Both plaintiffs engage in the outdoor advertising business in the City of San Diego. In March of 1974, the City of San Diego, defendant in both actions, enacted Ordinance Number 10795 which prohibits any offsite signs, and which provides an abatement schedule. The purposes set forth in the ordinance are: to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to insure that signing is used as identification and not as advertisement; and to preserve and improve the appearance of the City as a place in which to live and work. The intent set forth in the ordinance is: to protect an important aspect of the economic base of the City by preventing the distraction of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conferences; to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare. In essence, the ordinance prohibits the outdoor advertising business throughout the City of San Diego and requires the removal, without compensation, of all outdoor advertising displays owned by the plaintiffs pursuant to the abatement schedule.

The parties filed cross-motions for summary judgment and submitted a stipulation of facts. The facts, too numerous to enumerate herein, set forth statistics regarding the City of San Diego relative to size, composition of citizenry, structures, facilities, employment, etc., together with information, general and economic, regarding outdoor advertising and the plaintiffs' outdoor advertising displays.

Appendix D—Memorandum of Intended Ruling of the Superior Court

Plaintiffs have challenged the validity of the ordinance on the following general grounds:

1. The ordinance is a total prohibition and confiscates a useful, legitimate business without payment of just compensation in violation of the Federal and California Constitutions.

2. The ordinance violates the First Amendment of the Federal Constitution.

3. The ordinance is in excess of the police power of the defendant in that such may not be exercised for aesthetic purposes.

4. The City Council did not comply with the requirements of the California Environmental Quality Act of 1970.

5. The ordinance is invalid and contrary to federal and state statutes due to pre-emption and the failure to pay compensation.

6. The abatement schedule is unconstitutional.

The defendant City contends that the ordinance is constitutional and is not in conflict with federal or state legislation, and that plaintiffs have no standing to raise the California Environmental Quality Act of 1970.

California Environmental Quality Act

The applicability of the California Environmental Quality Act is not an issue raised by the pleadings. Plaintiffs, by virtue of Section 21167 of the Public Resources Code, are barred from asserting the defendant's failure to comply therewith, since no action or proceeding was commenced within 180 days of the date of the adoption of the ordinance.

Appendix D—Memorandum of Intended Ruling of the Superior Court

Federal and State Legislation

The California legislature, when it enacted the Outdoor Advertising Act (Sections 5200, et seq., Business & Professions Code), while not relinquishing its police power to control billboards, specifically reserved the right to local entities to adopt legislation more restrictive than the act, which merely set minimum standards. See *City of Escondido* v. *Desert Outdoor Advertising, Inc.* (1973), 8 Cal. 3d 785, 788, N.3.

Plaintiffs contend that to enforce the ordinance would be to place the State in the position of being in violation of the Federal Highway Beautification Act of 1965 (Pub. L. & O. 89-285, 79 Stat. 1028, 23 U.S.C. Section 131, et seq.), which requires the states to pay just compensation for the removal of outdoor advertising devices erected on interstate or primary highways. Even assuming that the State Act precludes the defendant from requiring the removal of signs covered by the Federal Highway Beautification Act without paying just compensation, the City declared illegal all such signs prior to the effective date of the Federal Act. See San Diego Municipal Code Sections 95.0301-95.0323.

Abatement Schedule

Plaintiffs bear the burden of proving an amortization period is unreasonable. *National Advertising Company* v. *County of Monterey* (1962), 211 Cal.App.2d 375, 381. Whether an amortization period is reasonable depends upon the particular property in use in issue, and each case must be determined on its own facts. *Bohannan* v. *City of San Diego* (1973), 30 Cal.App.3d 416, 426. Judicially approved "amortization", as a means of termination of nonconforming uses, need not constitute true amortization or

depreciation in an accounting sense, and it is not required that the nonconforming property have no value at the termination date. *Art Neon Company* v. *City and County of Denver,* 488 F.2d 118 (C.A. 10th Cir. 1973). The evidence established that plaintiff has only average costs for its structures for the entire State of California, and thus cannot separate out initial construction costs from labor, materials and overhead costs incurred subsequent to initial construction. Moreover, prior to October 1970, the term for plaintiffs' leases for property for maintenance of its signs was generally ten years. Plaintiffs have not established the unreasonableness of the amortization period. Plaintiffs' contentions that the amortization provision constitutes the taking of property without just compensation will be discussed *infra.*

First Amendment

Plaintiffs contend that outdoor advertising is a media of communication which acts as a conduit for messages of a political and social nature, as well as commercial, and accordingly, the First Amendment, as imposed upon the states through the Fourteenth Amendment, denies to the City the right or power to abridge such activities. The City responds that the freedom of speech protected by the constitutional guaranties includes, in the main, freedom of expression on political, sociological, religious, and economic subjects, not commercial activities, to which speech is only an instance or means, citing *In re Porterfield* (1946), 28 Cal.2d 91, 101-102.

In *United Advertising Corporation* v. *Borough of Raritan* (1952), 11 N.J. 144, it was contended that there was an unconstitutional abridgement of the guaranties of the freedom of speech in a distinction which permitted a businessman to

use a sign to advertise his business upon the premises, although he could not use that same sign to urge the public to purchase any lawful article of commerce elsewhere. The Court held that the answer was that those guaranties imposed no such restraint upon governmental regulation of purely commercial advertising.

Howard v. *State Department of Highways of Colorado,* 478 F.2d 581 (10th Cir. 1973), has held that an attack on the Colorado Outdoor Advertising Act based on First Amendment grounds presented no substantial federal question. The court held, at Page 584:

> ". . . the Supreme Court has long sustained exercises of the police power of the states for regulation and prohibition of various forms of outdoor commercial advertising. . .".

On the other hand, a District Court, in and for the City and County of Denver, State of Colorado, in *Combined Communications Corporation, et al.* v. *City and County of Denver, et al.,* Civil Action Number C-41119, reasoned that:

> "Although some courts have stated that purely commercial speech does not fall within the protection of the First Amendment, *e.g., Valentine* v. *Chrestensen,* 316 U.S. 52 (1942), based on the evidence which has been submitted to this Court, this position seems untenable. First of all, it is clear that the outdoor advertising devices involved in this case perform a useful and substantial function in conveying commercial messages to the public as a whole. Secondly, it is equally clear that a sizable amount of the messages carried on the outdoor advertising structures are non-commercial in nature and, therefore, could be protected under any-

body's definition of free speech. Additionally, when the Colorado Supreme Court has stated that, 'The constitutional guarantee of freedom of speech and press protects not only the great literary works which we all revere, but also those questionable forms of literary expression which some of us abhor,' *People* v. *Berger*, 521 P.2d 1244 (Colo. 1974), and when the United States Supreme Court has held over and over again that all but the hard-core forms of sexual pornography are protected free speech, *Redrup* v. *New York*, 386 U.S. 767 (1967), it is difficult for this Court to conclude that the messages contained on billboards in Denver are not at least as protected as those forms.

"It is recognized that freedom of speech is not an unlimited right and that reasonable regulations may be placed upon that right. However, the United States Supreme Court has stated that regulation of the right of free speech must 'further an important or substantial governmental interest' and must be 'no greater than is essential to the furtherance of that interest.' *Procunier* v. *Martinez*, 94 S. Ct. 1800 (1974)."

This Court is persuaded by the facts of the instant case that sufficient noncommercial messages have been, and will be, carried on plaintiffs' outdoor advertising devices to require the Court, in order to uphold the validity of the ordinance, to find that the ordinance furthers an important or substantial governmental interest, and that total unavailability that would be created by the ordinance is unreasonable. This subject is discussed *infra*.

Taking of Private Property Without Just Compensation

Police power should not be confused with eminent domain, in that the former controls the use of property by

the owner for the public good, authorizing its regulation and destruction without compensation, whereas the latter takes property for public use and compensation is given for property taken, damaged or destroyed. *Tamm* v. *Volpe*, 449 F.2d 1202 (1971).

A proper distinction may be drawn between onsite and offsite signs. It is true that signs relating only to goods sold or services rendered upon the building site on which they are erected or maintained may, although strictly limited as to size and number, have the same appearance as offsite signs. A significant difference, however, is that the onsite sign is but a part of, and wholly incidental to, the business conducted upon the site. Offsite signs, on the contrary, constitute a wholly distinct business, that of outdoor advertising. *National Advertising Company* v. *County of Monterey, supra.* Further, offsite signs are used in a realistic sense only where the light reflected therefrom strikes the eyes of the users of the public streets or adjoining private property and the members of the public required to use such signs gain no benefit therefrom in the sense that they are thereby directed to the location of a business activity which they may be immediately desirous of patronizing. *Metromedia, Inc.* v. *City of Pasadena* (1963), 216 Cal.App.2d 270. The distinction between the two classes of signs, therefore, is not unreasonable, arbitrary or discriminatory in any constitutionally prohibited sense.

It has long been settled that the unique nature of outdoor advertising, and the nuisances fostered by billboards and similar outdoor structures located by persons in the business of outdoor advertising, justify the separate classification of such structures for the purposes of governmental

regulation and restriction. *United Advertising Corp.* v. *Borough of Raritan, supra.* Property, including business, may be regulated or prohibited in the exercise of the police power, and damage caused by the proper exercise of the police power is merely one of the prices an individual must pay as a member of society. An individual cannot complain of incidental injury if the police power is exercised for proper purposes, and without an arbitrary and unreasonable application in the particular case. *City of Los Angeles* v. *Gage* (1954), 127 Cal.App.2d 442. Thus, restrictions upon the use of property in an exercise of the police power for an authorized purpose do not constitute the taking of property without compensation. *People Ex Rel. Department of Public Works* v. *Adco Advertisers* (1973), 35 Cal.App.3d 507.

The ordinance in question is not an enactment pursuant to the exercise of the power of eminent domain, and thus plaintiffs' contentions respecting just compensation are rejected.

Police Power

It thus becomes necessary to determine if the ordinance is a reasonable exercise of the police power. A municipality may enact zoning ordinances which regulate and restrict land use. The power to enact and enforce such measures is inherent in the police power. *People* v. *Johnson* (1954), 125 Cal.App.2d 1. The authority emanates from Article XI, Section 7 of the California Constitution, which empowers a county or state to make and enforce within its limits all police, sanitary, and other ordinances and regulations not in conflict with general laws. The power thus delegated to municipalities is as broad as that of the legislature itself, providing the power is exercised within the confines of the

city and is not in conflict with the state's general laws. *Carlin* v. *City of Palm Springs* (1971), 14 Cal.App.3d 706, 711.

In the exercise of its police power the City has broad discretion in determining what is reasonable in endeavoring to protect the public health, safety, morals and general welfare. The test as to whether a law enacted pursuant to the police power is arbitrary and discriminatory in its conception and application is whether it has any reasonable tendency to promote the public health, morals, safety or general welfare of the community. *Carlin* v. *City of Palm Springs, supra.*

The reasonable regulation of signs and billboards constitutes a valid exercise of the police power. *National Advertising Company* v. *County of Monterey, supra; Carlin* v. *City of Palm Springs, supra.* Accordingly a business which, when established, was entirely unobjectionable, may, by the growth or change in the character of the neighborhood, become a source of danger to the public health, morals, safety, or general welfare of those who have come to be occupants of the surrounding territory. *City of Los Angeles* v. *Gage, supra.*

Plaintiffs rely heavily on the case of *Varney and Green* v. *Williams* (1909), 155 Cal. 318, for the proposition that an ordinance cannot entirely prohibit the erection or maintenance of billboards. Defendant contends that is no longer the law today, in view of subsequent decisions and the markedly changed conditions in our urban areas of today, as compared to those existing in 1909 when, for example, there was not even comprehensive zoning. *Varney and Green* held that an ordinance undertaking to absolutely forbid the erection or maintenance of any billboard for

advertising purposes was not a lawful exercise of the police power; was the damaging of property for which the owner is entitled to compensation; and that such restriction is not justified, even if billboards are, or may be, offensive to the sight of persons of a refined taste. Many changes involving environmental and legal reasoning have taken place since 1909. The courts of other jurisdictions have expressed varying viewpoints on the subject. The Court in *Exton Quarries, Inc.* v. *Zoning Board of Adjustment* (1967), 425 Pa. 43, invalidated such an ordinance, holding that the constitutionality of zoning ordinances, which totally prohibit legitimate businesses from an entire community, should be regarded with particular circumspection, because they cannot be premised on the fundamental reasonableness of allocating to each type of activity a particular location in the community. They reasoned that if one municipality may, with only moderate justification totally prohibit an undesired use of land, it is not unlikely that surrounding municipalities will do the same. Likewise in *Norate Corporation* v. *Zoning Board of Adjustment* (1965), 417 Pa. 397, the Court had invalidated a billboard ordinance as being "patently unreasonable and invalid"; however, the Court footnoted the case of *New York State Thru. Auth.* v. *Ashley Motor Court, Inc.* (1961), 210 N.Y.S. 2d 193, which validated an ordinance prohibiting advertising devices within certain distances of a throughway, and which held that the state's police power is a flexible, broad, variable process of government, intent upon keeping up-to-date with all of the public and social needs and that what would be a violation thereof in prior years might of necessity, in an ever-changing world, become legal in present-day society, while what may have been valid when enacted might become unlawful, as a result of later

events. The California courts have followed similar reasoning by holding that the police power is elastic and capable of expansion to meet existing conditions of modern life. *National Advertising Company* v. *County of Monterey, supra.* The Pennsylvania Court again disallowed a total ban of signs in the more recent case of *Amerada Hess Corporation* v. *Zoning Board of Adjustment* (1973), 11 Pa. Cmwlth. 115, holding that a municipality has no power to place a blanket prohibition on all revolving signs without any regard to location, size of signs or other considerations. The Court, updating its reasons, specified that, while in most cases involving the constitutionality of ordinances there is a presumption of constitutionality and the burden of proving otherwise is on the party so asserting, cases involving total prohibition receive different treatment. After referring to the Pennsylvania case of *Beaver Gasoline Company* v. *Osborne Borough* (1971), 445 Pa. 571, to the effect that, situations involving the total prohibition of otherwise legitimate land uses, an applicant meets his burden of overcoming the presumption of constitutionality by showing the total ban, the Court held that common experience indicates revolving signs are not per se noxious, and thus the showing of the total ban overcame the presumption of constitutionality.

It becomes necessary to consider plaintiffs' contentions regarding aesthetics before concluding whether the defendant City properly exercised its police power in this matter. Plaintiffs contend that the ordinance was enacted principally, if not solely, to accomplish aesthetic purposes, despite the purpose and intention provisions thereof. While there is California authority that the City's police power does not include the power to legislate solely on aesthetic

grounds (*Varney and Green* v. *Williams, supra; City of Santa Barbara* v. *Modern Neon Sign Company* [1961], 189 Cal.App.2d 188, 197), aesthetics should be considered as a factor, together with other factors, in support of an ordinance. *Carlin* v. *City of Palm Springs, supra.* This view is shared in other jurisdictions. See, e.g., *Wolverine Sign Works* v. *City of Bloomfield Hills* (1937), 279 Michigan 205. The Court in *Desert Outdoor Advertising, Inc.* v. *County of San Bernardino* (1967), 255 Cal.App.2d 765, pointed out that the holdings of recent cases in California, despite *Varney and Green,* are that there are other justifications, such as an economic advantage to the area, which can sustain an ordinance enacted principally for aesthetic considerations. Moreover, the United States Supreme Court in *Berman* v. *Parker,* 348 U.S. 26 (1954), held that the concept of the public welfare is broad and inclusive, and that the values it represents are spiritual as well as physical, aesthetic as well as monetary, and that it is within the power of the legislature to determine that the community should be beautiful as well as healthy. This Court also has given due weight to the proposition set forth in *Cromwell* v. *Ferrier* (1967), 19 N.Y.2d 263, as follows:

> "The Constitution, it is true, does not change with the times, nor does an emergency or unusual circumstance warrant a disregard of constitutional provisions. A determination of what is due process, aside from procedural matters, however, depends upon the reasonableness of the legislation. Circumstances, surrounding conditions, changed social attitudes, newly-acquired knowledge, do not alter the Constitution, but they do alter our view of what is reasonable. Restrictions

upon the use of property, which were deemed unreasonable in 1909, are regarded today as entirely reasonable and natural.

"Once it be conceded that aesthetics is a valid subject of legislative concern, the conclusion seems inescapable that the reasonable legislation designed to promote that end is a valid and permissible exercise of the police power.

"Realistically, the primary objective of any anti-billboard ordinance is an aesthetic one (*Dukeminier, Zoning for Aesthetic Objectives: A Reappraisal,* 20 Law and Contemp. Prob. 218, 220)."

That Court further held that legislation must still be voided if it constitutes an unreasonable device of implementing community policy, and that the exercise of the police power should not extend to every artistic conformity or nonconformity. Rather, what is involved are those aesthetic considerations which bear substantially on economic, social and cultural patterns of community or district; that advertising signs and billboards, if misplaced, often are egregious examples of ugliness, distraction and deterioration; that they are also as subject to reasonable controls, including prohibition, as enterprises which omit offensive noises, odors or debris; that the eye is entitled to as much recognition as the other senses, but, of course, the offense to the eye must be substantial, and be deemed to have material effect on the community or district pattern. Finally, the California Supreme Court has indicated that an ordinance prohibiting advertising signs adjacent to freeways was for the purpose of enhancing community aesthetic values as well as highway safety. See *City of San Diego* v. *Desert*

Appendix D—Memorandum of Intended Ruling of the Superior Court

Outdoor Advertising, Inc. (1973), 8 Cal.3d 785, 790. This Court recognizes that the common use of rail transportation is virtually non-existent, and that it is a well-known fact that people generally have recourse to the automobile as the common means of transportation (*Gwazner Corp.* v. *Minier* [1975], 46 Cal.App.3d 777) and therefore that the hazards purpose of the ordinance is a valid exercise of police power.

This Court thus concludes that the ordinance was not enacted solely for aesthetic purposes and hence cannot be found to be an improper exercise of the police power on that ground.

In determining whether the City has otherwise properly exercised its police power, this Court is not unmindful of the well-recognized principle that courts are loathe to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such enactment, and that a large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. The Court also has in mind that in virtually all cases which have discussed regulations totally abolishing billboards, the regulations were held to be invalid exercises of the police power, and that California courts have held the question of reasonableness is to be determined largely by balancing public gains against private losses. See, e.g., *National Outdoor Advertising Company* v. *County of Monterey, supra.* See also *City of Los Angeles* v. *Gage, supra,* which held that constitutionality depends on the relative importance to be given to the public gain and to the private loss.

This Court is also aware that it is neither a super board of adjustment nor a planning commission of last resort, but

acts as a judicial overseer, drawing the limits beyond which local regulation may not go, but loathing to interfere, within those limits, with the discretion of local governing bodies. Further, that the zoning power is one of the tools of government which, in order to be effective, must not be subjected to judicial interference unless clearly necessary.

The ordinance in question does not declare offsite signs to be a nuisance, hence distinguishing it from most ordinances declaring advertising adjacent to its freeways to be a nuisance, such as *City of Escondido* v. *Desert Outdoor Advertising, Inc.,* 8 Cal.3d 785. Even if such a declaration were contained in the ordinance, it would be subject to the constitutional protection against unreasonable or arbitrary action on the part of the City. *People Ex Rel. Department of Public Works* v. *Adco Advertising, supra.* Moreover, the ordinance in question is cast in the form of a penal statute subjecting violators to a fine and imprisonment. Additionally, the business of the plaintiffs has been declared to be a legitimate, commercial use of property adjacent to roads and highways and to be an integral part of the business and marketing function as well as an established segment of the national economy. The legislature has further declared that it should be allowed to exist in business areas, subject to reasonable control in the public interest. (Section 552 California Business & Professions Code.)

The total use prohibition of the ordinance in question should not be permitted to exist without clearly substantiated proof of its relationship to the governmental police power, nor unless the total unavailability of freedom of speech is no greater than is essential to the furtherance of an important or substantial governmental interest. While

the purposes and intents of the ordinance appear salutory, the aforementioned involvement of freedom of speech, together with the facts of the clear and demonstrated adverse effects caused to plaintiffs, compel the Court to conclude that the private and public losses clearly outweigh the public gains.

The end, however attractive it may appear, does not justify unconstitutional means. Accordingly, the Court grants the plaintiffs' motions for summary judgment, and finds that the ordinance in question is invalid and unconstitutional and that the permanent injunction prayed for should issue.

Dated: May 27, 1975

JACK R. LEVITT
Judge of the Superior Court

APPENDIX E

Order of the Superior Court

OPINION BY JUDGE JACK R. LEVITT

June 27, 1975

No. 332881

METROMEDIA, INC., a corporation, doing business as FOSTER AND KLEISER,

Plaintiff,

vs.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Defendants.

No. 333292

(Consolidated)

PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Plaintiff,

vs.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Defendants.

The motions of plaintiffs Metromedia, Inc. and Pacific Outdoor Advertising Company, Inc. for summary judgment

in these consolidated actions and the motions of defendant City of San Diego for summary judgment came on regularly for hearing in Department 11 of the above-entitled Court before the Honorable Jack R. Levitt, Judge of the Superior Court of the State of California for the County of San Diego on February 28, 1975. Gibson, Dunn & Crutcher by Theodore B. Olson and Hillyer & Irwin by Oscar F. Irwin appeared as counsel for plaintiff Metromedia, Inc. Snell & Wilmer by John J. Bouma and Guy G. Gelbron and Higgs, Fletcher & Mack by Joe N. Turner appeared as counsel for plaintiff Pacific Outdoor Advertising Co., Inc. John W. Witt, City Attorney by C. Alan Sumption, Deputy City Attorney, appeared as counsel for defendants. The matter was argued and submitted.

The Court having fully examined the pleadings on file herein, the Joint Stipulation of Facts, the declarations filed relative to the various motions, the interrogatory answers, deposition testimony and responses to requests for admissions cited in support and in opposition to the various motions and the exhibits to such material and having read the points and authorities filed with respect to such motions, having heard oral argument with respect to said motions and after taking judicial notice of matters judicially noticed, and being fully advised in the premises and good cause of affirming therefor:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the motions of the plaintiffs for summary judgment on the grounds that there are no defenses to the actions of the plaintiffs, no triable issues of any material fact relative thereto, and that the moving parties are entitled to judgment as a matter of law, be and they are hereby granted; and judgment shall be entered in favor of plaintiffs.

Appendix E—Order of the Superior Court

IT IS HEREBY FURTHER ORDERED, ADJUDGED, AND DECREED that the motions of defendants be and they hereby are denied.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that Ordinance No. 10795 (N.S.) of the City of San Diego, except Sections 101.0701 and 101.0702 thereof, is unconstitutional, null and void.

IT IS HEREBY FURTHER ORDERED, ADJUDGED AND DECREED that defendants, their agents, servants, employees and representatives and all persons acting in concert or participating therewith shall be and they hereby are enjoined and restrained from engaging in, committing or performing, or causing to be done, directly or indirectly, any or all of the following acts:

> Taking any steps or proceeding in any manner to enforce the provisions of Ordinance No. 10795 (N.S.) of the City of San Diego, except sections 101.0701 and 101.0702 thereof, to prevent or prohibit the erection, operation, maintenance, or customary use by the plaintiffs, and each of them, of any and all outdoor advertising displays now or hereafter owned by plaintiffs, or each of them, in the City of San Diego, or taking any steps or proceeding in any manner whatsoever to compel or require the removal thereunder of any such display now owned by plaintiffs or each of them, in the City of San Diego, or otherwise to take any steps or to proceed in any manner to enforce the provisions of said ordinance.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all bonds filed by plaintiffs in connection with the issuance of

temporary restraining orders and preliminary injunctions be and they hereby are exonerated.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that plaintiff Metromedia, Inc. shall have and recover from defendant City of San Diego their costs and disbursements in the sum of $ ..... and that plaintiff Pacific Outdoor Advertising Co., Inc. shall have and recover from defendants The City of San Diego, The City Council of San Diego, and Voyd Beights, Zoning Administrator of the City of San Diego, and each of them, their costs and disbursements in the sum of $.....

Dated: June 27, 1975

JACK R. LEVITT
Judge of the Superior Court

APPENDIX F

Notice of Appeal

L.A. Number 30782 San Diego County Superior Court Nos. 332881 and 333292

IN THE

SUPREME COURT
OF THE STATE OF CALIFORNIA

METROMEDIA, INC., a corporation dba FOSTER AND KLEISER,

Plaintiff and Appellant,

VS.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Defendants and Appellees.

PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Plaintiff and Appellant,

VS.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego, and DOES I through X, inclusive,

Defendants and Appellees.

TO THE HONORABLE ROSE E. BIRD, CHIEF JUSTICE OF CALIFORNIA AND THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Appendix F—Notice of Appeal

NOTICE IS HEREBY GIVEN that plaintiffs Metromedia, Inc. and Pacific Outdoor Advertising Co., Inc. hereby appeal to the United States Supreme Court, from so much of the final judgment of the Supreme Court of the State of California in the within action which is reflected in the Opinion of said Court issued on April 14, 1980, as modified on denial of rehearing on May 14, 1980, which upheld, as against challenges under the Constitution of the United States, the constitutionality of San Diego Ordinance No. 10795 (New Series).

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Dated: July 23, 1980

GIBSON DUNN & CRUTCHER
THEODORE B. OLSON
WAYNE W. SMITH
515 South Flower Street
Los Angeles, California 90071

By /s/ THEODORE B. OLSON
Theodore B. Olson

Attorneys for Plaintiff
Metromedia, Inc.

CAHILL GORDON & REINDEL
FLOYD ABRAMS
80 Pine Street
New York, New York 10005

By /s/ FLOYD ABRAMS by DB
Floyd Abrams

Attorneys for Plaintiff
Outdoor Advertising Co., Inc.

APPENDIX G

Constitutional and Statutory Provisions

The First Amendment to the United States Constitution provides, in part:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press. . . ."

The Fourteenth Amendment of the United States Constitution provides, in part:

> "No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

ORDINANCE NO. 10795

(New Series)

AN ORDINANCE AMENDING CHAPTER IX, ARTICLE 5, OF THE SAN DIEGO MUNICIPAL CODE, BY REPEALING SECTIONS 95.0103.11, 95.0103.12, 95.0301, 95.0302, 95.0302.5, 95.0302.6, 95.0303, 95.0304, 95.0305, 95.0306, 95.0307, 95.0308, 95.0309, 95.0321, 95.0322, 95.0323, 95.0324, 95.0325, 95.0326 AND 95.0327, AND AMENDING CHAPTER X, ARTICLE 1, OF THE SAN DIEGO MUNICIPAL CODE BY AMENDING THE TITLE OF DIVISION 7 AND ADDING SECTIONS 101.0700, 101.0701 AND 101.0702, RELATING TO GENERAL SIGN REGULATIONS.

BE IT ORDAINED, by the Council of The City of San Diego, as follows:

Section 1. That Chapter IX, Article 5, of the San Diego Municipal Code be amended by repealing the following sections:

SEC. 95.0103.11 SIGN CONTROL DISTRICT (LA JOLLA AREA)

SEC. 95.0103.12 SIGN CONTROL DISTRICT—RANCHO BERNARDO

SEC. 95.0301 PURPOSE

SEC. 95.0302 DEFINITIONS

SEC. 95.0302.5 OUTDOOR ADVERTISING DISPLAY SIGN—DEFINED

SEC. 95.0302.6 SIGN—DEFINED

SEC. 95.0303 PROHIBITED SIGNS

SEC. 95.0304 REMOVAL REQUIRED

SEC. 95.0305 EXEMPT OUTDOOR ADVERTISING DISPLAY SIGNS

SEC. 95.0306 CONSTRUCTION STANDARDS

SEC. 95.0307 PERMITS

SEC. 95.0308 DISPLAY SIGNS—BOARD OF ZONING APPEALS

SEC. 95.0309 ENFORCEMENT

SEC. 95.0321 U.S. HIGHWAY 80—REGULATED

SEC. 95.0322 U.S. HIGHWAY 395—REGULATED

SEC. 95.0323 FEDERAL AID INTERSTATE (5) —REGULATED

SEC. 95.0324 SOLEDAD FREEWAY—REGULATED

SEC. 95.0325 STATE HIGHWAY 94—REGULATED

SEC. 95.0326 INTERSTATE 805—REGULATED

SEC. 95.0327 STATE HIGHWAY 109—REGULATED

Section 2. That Chapter X, Article 1, of the San Diego Municipal Code be amended by changing the Title of Division 7 and adding Sections 101.0700, 101.0701 and 101.0702 to read as follows:

DIVISION 7

GENERAL SIGN REGULATIONS

SEC. 101.0700 PROHIBITION AND ABATEMENT OF OUTDOOR ADVERTISING DISPLAY SIGNS

A. Purpose and Intent

It is the purpose of these regulations to eliminate excessive and confusing sign displays which do not relate to the premises on which they are located; to eliminate hazards to pedestrians and motorists brought about by distracting sign displays; to ensure that signing is used as identification and not as advertisement; and to preserve and improve the appearance of the City as a place in which to live and work.

It is the intent of these regulations to protect an important aspect of the economic base of the City by preventing the destruction of the natural beauty and environment of the City, which is instrumental in attracting nonresidents who come to visit, trade, vacation or attend conventions;

to safeguard and enhance property values; to protect public and private investment in buildings and open spaces; and to protect the public health, safety and general welfare.

B. Off-Premise Outdoor Advertising Display Signs Prohibited

Only those outdoor advertising display signs, hereinafter referred to as signs in this Division, which are either signs designating the name of the owner or occupant of the premises upon which such signs are placed, or identifying such premises; or signs advertising goods manufactured or produced or services rendered on the premises upon which such signs are placed shall be permitted. The following signs shall be prohibited:

1. Any sign identifying a use, facility or service which is not located on the premises.
2. Any sign identifying a product which is not produced, sold or manufactured on the premises.
3. Any sign which advertises or otherwise directs attention to a product, service or activity, event, person, institution or business which may or may not be identified by a brand name and which occurs or is generally conducted, sold, manufactured, produced or offered elsewhere than on the premises where such sign is located.

C. Abatement of Nonconforming Signs

Any sign which is nonconforming in that it does not conform to the regulations embodied in this Division shall either be removed or brought into compliance with the

Code requirements within the period of time prescribed herein dating from the effective date of these regulations.

D. Abatement Schedule

All nonconforming signs shall be removed or brought into compliance with the Code requirements in accordance with the abatement schedule set forth below. In order to utilize the abatement schedule, the owner of record, or his agent, shall make available the market value, as of April 1, 1972, of any sign or signs which have been deemed nonconforming by the provisions of these regulations. The market value of nonconforming signs shall be based on the original cost, including cost of installation, of said sign less ten percent of the original cost per year for each year said sign has been standing prior to the effective date of these regulations.

The date of erection of any nonconforming sign shall be established by the presentation by the owner of record of the sign, or his agent, of a certified copy of the corresponding building permit on file in the Department of Building Inspection of the City of San Diego. Any sign erected without the issuance of a valid building permit shall be deemed an illegal sign and shall be removed immediately.

All required documentation concerning the market value and erection date of any nonconforming sign shall be presented to the Zoning Administrator within ten days of reception of notice of nonconformance. The Zoning Administrator shall determine to his satisfaction the validity of all presented documentation. Any decision of the Zoning Administrator may be appealed in accordance with Sections 101.0504 and 101.0505 of this Code.

Appendix G—Constitutional and Statutory Provisions

ABATEMENT SCHEDULE

Adjusted Market Value	*Abatement Date*
Less than $500.00	April 1, 1973
$ 500.00 to 999.99	July 1, 1973
1,000.00 to 1,499.99	October 1, 1973
1,500.00 to 1,999.99	January 1, 1974
2,000.00 to 2,999.99	April 1, 1974
3,000.00 to 3,999.99	July 1, 1974
4,000.00 to 4,999.99	October 1, 1974
5,000.00 to 7,499.99	January 1, 1975
7,500.00 to 9,999.99	April 1, 1975
10,000.00 to 12,499.99	July 1, 1975
12,500.00 to 14,999.99	October 1, 1975
15,000.00 to 19,999.99	January 1, 1976
20,000.00 and over	April 1, 1976

Notwithstanding any other provisions of this Code, all outdoor advertising display signs which are not signs designating the name of the owner or occupant of the premise upon which such signs are placed or which do not identify such premises or which do not advertise goods manufactured or produced or services rendered on the property upon which such signs are placed and which are signs designed to be viewed from any portion of a freeway, landscaped freeway, scenic highway or freeway, or parkway as defined in Sections 95.0302.1, 95.0302.2, 95.0302.3 and 95.0302.4 of this Code and are located within 500 feet from the boundary line of said freeway, landscaped freeway, scenic highway or freeway, or parkway shall be abated within 90 days of the effective date of these regulations. Any such sign not abated within 90 days of the effective date of these regulations shall be subject to all of the provisions of Section 101.0700, paragraph E.

E. Removal of Nonconforming Signs

Any sign that is in noncompliance with the regulations of this Code as defined in Section 101.0700 shall be removed prior to or upon the date designated for removal in the above abatement schedule. If the owner of, or the person or persons responsible for, the sign fails to remove the nonconforming sign, the owner of the premises upon which the sign is located shall be responsible for the removal of the sign and the work shall be done within 90 days following the date of nonconformance. The procedure for the removal of all nonconforming signs shall be as follows:

1. The Zoning Administrator, after proper notification, may cause the removal of any nonconforming sign and shall, at his discretion, charge the costs incurred against any of the following, each of whom shall be jointly and severally liable for said charges; provided, however, that any decision or determination of the Zoning Administrator may be appealed in accordance with Sections 101.0504 and 101.0505 of this Code.

   a. The permittee.

   b. The owner of the sign.

   c. The owner of the premises on which the sign is located.

   d. The occupant of the premises on which the sign is located.

2. A sign removed by the City shall be held not less than 30 days by the City during which time it may be recovered by the owner upon payment to the City for costs of removal and storage. If not recovered prior to expiration of the 30-day period, the sign and sup-

porting structures shall be declared abandoned and title thereto shall vest in the City and the cost of removal shall be billed to the owner.

F. Signs Exempt From These Regulations

The following types of signs shall be exempt from the provisions of these regulations:

1. Any sign erected and maintained pursuant to and in discharge of any governmental function or required by any law, ordinance or governmental regulation.
2. Bench signs located at designated public transit bus stops; provided, however, that such signs shall have any necessary permits required by Sections 62.0501 and 62.0502 of this Code.
3. Signs being manufactured, transported and/or stored within the City limits of the City of San Diego shall be exempt; provided, however, that such signs are not used, in any manner or form, for purposes of advertising at the place or places of manufacture or storage.
4. Commemorative plaques of recognized historical societies and organizations.
5. Religious symbols, legal holiday decorations and identification emblems of religious orders or historical societies.
6. Signs located within malls, courts, arcades, porches, patios and similar areas where such signs are not visible from any point on the boundary of the premises.

7. Signs designating the premises for sale, rent or lease; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.
8. Public service signs limited to the depiction of time, temperature or news; provided, however, that any such sign shall conform to all regulations of the particular zone in which it is located.
9. Signs on vehicles regulated by the City that provide public transportation including, but not limited to, buses and taxicabs.
10. Signs on licensed commercial vehicles, including trailers; provided, however, that such vehicles shall not be utilized as parked or stationary outdoor display signs.
11. Temporary off-premise subdivision directional signs if permitted by a conditional use permit granted by the Zoning Administrator.
12. Temporary political campaign signs, including their supporting structures, which are erected or maintained for no longer than 90 days and which are removed within 10 days after election to which they pertain.

G. Conflict With Other Regulations of This Code

Where there is a conflict between the regulations of Section 101.0700 and the regulations of any other section of this Code, the regulations of Section 101.0700 shall prevail; provided, however, that the regulations of other sections shall prevail in the following cases:

1. Where the regulations of any other section are more restrictive.
2. Where a sign control district has been established by ordinance, provided that the assigned regulations of said district are comprehensive and provide sign regulations for all zones located within said district.
3. Where a planned district has been established in accordance with the procedure set forth in Section 103.0101 of this Code, provided that any such planned district regulations shall include comprehensive sign regulations encompassing the entire planned district area.
4. Where an architectural control district has been established by ordinance, provided that any such architectural control district regulations shall include comprehensive sign regulations encompassing the entire architectural control district area.

H. Compliance With Chapter IX of This Code

Nothing in the regulations of Section 101.0700 shall relieve any party from the requirements to obtain any or all permits required by Chapter IX of this Code.

SEC. 101.0701 SIGN CONTROL DISTRICT—LA JOLLA

A. Purpose and Intent

The Sign Control District is intended to maintain the unique, distinctive character and economic value of the La Jolla area in the City of San Diego and to regulate advertising of commercial enterprises in the R-1 and R-2 Zones within the boundaries of the Sign Control District.

B. Boundaries

The boundaries of the La Jolla Sign Control District are designated on that certain map No. C-267 and described in the appended boundary description filed in the office of the City Clerk under Document No. 709551.

C. Sign Defined

For the purposes of this section the word sign is hereby defined to mean any fabricated sign including its structure, consisting of any letter, figure, character, mark, paint, plane, marquee, sign, design poster, pictorial picture, stroke, strip, line, trademark, reading matter or illuminating device constructed, attached, erected, fastened, or manufactured in any manner whatsoever so that the same shall be used for the attraction of the public to any place, subject, person, firm, corporation, public performance, article, machine, or merchandise whatsoever and displayed in any manner whatsoever in or out of doors for recognized advertising purposes, and shall also include any such sign carrying the following words, or words of similar import: "for rent," "for sale" or "for lease."

D. Signs Regulated

1. Except as otherwise provided herein, it shall be unlawful for any person to erect or cause to be placed or maintained any sign or signs upon real property in the R-1 or R-2 Zones within the Sign Control District.

2. One sign shall be permitted on each lot or parcel of real estate, to advertise the leasing, rental or sale of such lot or parcel, provided that such sign meets all of the following conditions:

a. Such sign shall be installed and maintained by, or at the direction of, the owner of such lot or parcel of real property.

b. Such sign shall not exceed 5″ x 8″ in size and no part of such sign shall extend more than four feet above the surface of the ground upon which it is erected.

c. Such sign shall be erected and maintained substantially parallel to the street which such lot or parcel faces.

d. Such sign shall be unlighted.

3. Signs for real estate sales offices, demonstration, or model dwelling units, and name plates, shall be permitted subject to the conditions provided in the Municipal Code for R-1 and R-2 Zones.

4. In the R-2 Zone, church signs shall be permitted pursuant to the provisions of the R-2 Zone.

E. Existing Controls

The requirements of this section shall be in addition and supplementary to all other existing sign controls now in effect for R-1 and R-2 Zones under the provisions of the Code, and shall prevail in the event of any conflict.

SEC. 101.0702 SIGN CONTROL DISTRICT—RANCHO BERNARDO

A. Purpose and Intent

The Sign Control District is intended to maintain the unique, distinctive character and economic value of the Rancho Bernardo area in the City of San Diego and to

regulate advertising of commercial enterprises in the R-1, R-2, A-1-1, A-1-5 and A-1-10 Zones within the boundaries of the Sign Control District.

B. Boundaries

The boundaries of the Rancho Bernardo Sign Control District are designated on that certain map No. C-280 and described in the appended boundary description filed in the office of the City Clerk under Document No. 729898.

C. Signs Defined

For the purposes of this section, the word "sign" is hereby defined to mean any fabricated sign including its structure, consisting of any letter, figure, character, mark, paint, plane, marquee, sign, design, poster, pictorial picture, stroke, strip, line, trademark, reading matter or illuminating device constructed, attached, erected, fastened, or manufactured in any manner whatsoever so that the same shall be used for the attraction of the public to any place, subject, person, firm, corporation, public performance, article, machine, or merchandise whatsoever and displayed in any manner whatsoever in or out of doors for recognized advertising purposes, and shall also include any such sign carrying the following words, or words of similar import: "for rent," "for sale" or "for lease."

D. Signs Regulated

1. Except as otherwise provided herein, it shall be unlawful for any person to erect or cause to be placed or maintained any sign or signs upon real property in the R-1, R-2, A-1-1, A-1-5 or A-1-10 Zones within this Sign Control District.

2. One sign shall be permitted on each lot or parcel of real estate, to advertise the leasing, rental or sale of such lot or parcel, provided that such sign meets all of the following conditions:

   a. Such sign shall be installed and maintained by, or at the direction of, the owner of such lot or parcel of real property.

   b. Such sign shall be erected and maintained substantially parallel to the street which such lot or parcel faces.

   c. Such sign shall not exceed 9″ x 12″ in size and no part of such sign shall extend more than four feet above the surface of the ground upon which it is erected.

   d. Such sign shall be unlighted.

3. Signs for real estate sale offices, demonstration, or model dwelling units, and name plates, shall be permitted subject to the conditions provided in the Municipal Code for R-1, R-2, A-1-1, A-1-5 and A-1-10 Zones.

4. In the R-2 Zone, church signs shall be permitted pursuant to the provisions of the R-2 Zone.

E. Existing Controls

The requirements of this section shall be in addition and supplementary to all other existing sign controls now in effect for R-1, R-2, A-1-1, A-1-5 and A-1-10 Zones under the provisions of the Code, and this section shall prevail in the event of any conflict.

Section 3. Severability. If any section, subsection, sentence, clause or phrase of this ordinance is for any reason held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this ordinance. The City Council hereby declares that it would have passed this ordinance, and each section, subsection, sentence, clause and phrase hereof irrespective of the fact that any one or more of the sections, subsections, sentences, clauses or phrases hereof be declared invalid or unconstitutional.

Section 4. This ordinance shall take effect and be in force on the thirtieth day from and after its passage. No sign permit for any sign shall be issued on or after the effective date of this ordinance unless the sign and the premises conform in every respect to the provisions of this ordinance and other applicable Municipal Code regulations.

Introduced on February 22, 1972.

Passed and adopted by the Council of The City of San Diego on March 14, 1972.

AUTHENTICATED BY:

PETE WILSON,
Mayor of The City of San Diego, California.
EDWARD NIELSEN,
City Clerk of The City of San Diego, California.
By JUDITH A. DILLON, Deputy.

(SEAL)

Published March 23, 1972

APPENDIX H

Joint Stipulation of Facts

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN DIEGO

METROMEDIA, INC., a corporation doing business as FOSTER AND KLEISER,

Plaintiff,

vs.

CITY OF SAN DIEGO, a municipal corporation, and DOES I through XX, inclusive,

Defendants.

PACIFIC OUTDOOR ADVERTISING CO., INC., an Arizona corporation,

Plaintiff,

vs.

THE CITY OF SAN DIEGO, a municipal corporation, THE CITY COUNCIL OF SAN DIEGO, VOYD BEIGHTS, Zoning Administrator of the City of San Diego and DOES 1 through 10, inclusive,

Defendants.

The parties to this litigation are filing cross-motions for summary judgment. This Stipulation of Facts is entered into for the purpose of these motions and for any judgment thereon or appeals therefrom and for no other purpose. The parties agree that the facts specified herein are true for said purposes only and none of the parties hereto shall be bound thereby for any other purposes.

Appendix H—Joint Stipulation of Facts

STIPULATED FACTS

1. On March 14, 1972, the City Council of the City of San Diego adopted Ordinance No. 10795, a true, correct and complete copy of which is attached hereto and incorporated herein by reference as Exhibit A.

2. If enforced as written, Ordinance No. 10795 will eliminate the outdoor advertising business in the City of San Diego.

3. The City of San Diego, with a population of 750,000 people*, is the second most populated city in the State of California, the most populated state in the nation.

4. The City of San Diego is the seat of the county government of the County of San Diego. The County has a population in excess of 1,500,000 persons.*

5. The City of San Diego contains approximately 320 square miles or 204,800 acres.

6. The City of San Diego is multi-faceted, containing beaches, hills, residential areas, parks, a major seaport and naval base, a substantial commercial area, hundreds of miles of streets, highways and freeways, a large industrial area, a major airport and numerous major industries.

7. The citizens of the City of San Diego derive their livelihood from a variety of sources, including retail businesses, heavy industry, commercial centers, tourist services, agriculture, government contracts, wholesale supplies and a variety of services.

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* As of April, 1974.

8. The homes, commercial structures and industrial facilities of the City of San Diego are of all vintages, old and new. Some sections of the City of San Diego are scenic, some blighted, some containing strips of vehicle related commercial uses, some contain new and attractive office buildings, some functional industrial development and some areas contain older but useful commercial establishments.

9. Approximately 13% of the City of San Diego is zoned for residential purposes, 1.4% for commercial uses, 1.4% industrial, 8.5% for streets and highways, 20% for public and semi-public uses and the balance is vacant or used for agricultural purposes.*

10. The City of San Diego General Plan adopted in 1967 indicates its citizens found employment substantially as follows in the year 1962:**

Agriculture	1.6%
Construction	6.6%
Manufacturing	22.4%
Transportation, Communication and Utilities	4.7%
Wholesale Trade	3.2%
Retail Trade	17.5%
Finance, Insurance and Real Estate	4.5%
Services	19.2%
Government	19.7%

* These figures are approximate figures for 1967, the date of the San Diego General Plan. The same general proportions may be considered valid for all other periods relevant to this litigation.

** Certain minor fractions have been omitted from this table. While the fractions specified have undoubtedly fluctuated over the years, such changes would be of such magnitude as not to be material to this motion. Therefore, these figures may be taken as true for all periods relevant to this litigation.

Appendix H—Joint Stipulation of Facts

11. The City of San Diego General Plan of 1967 projected a 1985 population of almost double that of 1967.

12. Both of the plaintiffs are companies legally engaged in the outdoor advertising business in the City of San Diego and the State of California. (Defendant, of course, contends that Ordinance No. 10795 is legal and valid and that plaintiffs are currently in violation of this Ordinance. Accordingly, to this extent, defendant does not admit that plaintiffs are at this time "legally engaged in business in the City of San Diego.")

13. Each of the plaintiffs are the owners of a substantial number of outdoor advertising displays (approximately 500 to 800) in the City of San Diego.

14. Substantially all of the displays owned by plaintiffs are located on property leased by the owners thereof to the plaintiffs for the purposes of maintaining outdoor advertising displays thereon.*

15. Each of the displays were legally erected in full compliance with all applicable municipal and state laws and are in full compliance with such laws except for the contested legality of Ordinance No. 10795.

16. The cost of producing and erecting each display was substantial.

17. The displays have varying values depending upon their size, nature and location.

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* A few may be located on property owned by the plaintiffs.

18. Each of the displays has a fair market value, as a part of an income-producing system, of between $2,500 and $25,000.

19. Each display has a remaining useful income-producing life in excess of 25 years.

20. All of the signs owned by plaintiffs in the City of San Diego are located at areas zoned for commercial and industrial purposes.

21. Outdoor advertising is a means of communication and a media for the expression of ideas.

22. There is a difference between the outdoor advertising business and "on-site" or business signs. On-site signs advertise businesses, goods or services available on the property on which the sign is located. On the other hand, the outdoor advertising businesses lease real property and erect signs thereon which are made available to national and local advertisers for commercial, political and social messages. Outdoor advertising is different from on-site advertising in that:

(a) The outdoor advertising sign seldom advertises goods or services sold or made available on the premises on which the sign is located.

(b) The outdoor advertising sign seldom advertises products or services sold or made available by the owner of the sign.

(c) The outdoor advertising sign is, generally speaking, made available to "all-comers", in a fashion similar to newspaper or broadcasting advertising. It

is a forum for the communication of messages to the public.

(d) The copy of the outdoor advertising sign changes, usually monthly. For example, a particular sign may advertise a local savings and loan association one month, a candidate for mayor the next month, the opening of the San Diego Zoo the third month, a new car the fourth month, and a union grievance the fifth month.

23. Outdoor advertising is available for all forms of advertising messages. For example, it has been used in the City of San Diego to advertise national and local products, goods and services, new products being introduced to the consuming public, to publicize the "City in motion" campaign of the City of San Diego, to communicate messages from candidates for municipal, state and national offices, including candidates for judicial office, to propose marriage, to seek employment, to encourage the use of seat belts, to denounce the United Nations, to seek support for Prisoners of War and Missing in Action, to promote the United Crusade and a variety of other charitable and socially-related endeavors and to provide directions to the traveling public.

24. Outdoor advertising is customarily purchased on the basis of a presentation or campaign requiring multiple exposure. Usually a large number of signs in a variety of locations are utilized to communicate a particular advertiser's message. An advertiser will generally purchase a "showing" which would involve the utilization of a specific number of signs advertising the same message in a variety of locations throughout a metropolitan area. Each separate

sign provides exposure of various portions of the populace and each sign thereby forms an integral part of an interdependent whole. As a result, each sign in addition to producing income in and of itself, lends value to the entire system. Therefore, each sign has a value substantially more as a part of the system than it does separately. The value of each sign as a part of an overall system is not readily susceptible to precise measurement.

25. Outdoor advertising is presented in two basic standardized forms. A "poster panel" is a 12-foot by 24-foot sign on which a pre-printed message is posted, in sheets. A "painted bulletin" is generally a 14-foot by 48-foot sign which contains a hand painted message. The message will remain in one place for a period of time, usually a month, and will then be disassembled and replaced by another message while the first message is moved to another sign. In this way, the same hand painted message will be moved throughout a metropolitan area over a six-month or twelve-month period.

26. Plaintiffs' outdoor advertising displays produce substantial gross annual income.

27. Plaintiffs' outdoor advertising displays produce income to a variety of segments of the national, state and local economy and stimulate the flow of trade and commerce. Land owners and advertising agencies receive income from outdoor advertising.

28. Outdoor advertising increases the sales of products and produces numerous direct and indirect benefits to the public. Valuable commercial, political and social information is communicated to the public through the use of out-

door advertising. Many businesses and politicians and other persons rely upon outdoor advertising because other forms of advertising are insufficient, inappropriate and prohibitally expensive.

29. Enforcement of Ordinance No. 10795, in addition to eliminating outdoor advertising within the City of San Diego, will adversely affect plaintiffs' businesses outside the City of San Diego in that many national or state-wide advertisers will be inclined to select other media capable of communicating with a wider segment of the consuming public, including San Diego, rather than selecting outdoor advertising which would be unable to communicate with the citizens of San Diego.

30. Plaintiffs and their predecessors have engaged in outdoor advertising in the City of San Diego for more than 60 years.

31. Many of the plaintiffs' signs are within 660 feet and others are within 500 feet of Interstate or Federal Aid Primary highways and are designed to be viewed therefrom.

32. Enforcement of Ordinance No. 10795 will prevent plaintiffs from engaging in the outdoor advertising business in the City of San Diego and will cause plaintiffs to suffer substantial monetary losses.

33. Plaintiffs have entered into contracts to display messages on their respective signs in the City of San Diego; said contracts extending for various periods of time.

34. "The amortization provisions" of Ordinance No. 10795 have no reasonable relationship to the fair market

value, useful life or income generated by the signs and were not designed to have such a relationship.

Dated: November 21, 1974

GIBSON, DUNN & CRUTCHER
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By /s/ C. ALAN SUMPTION
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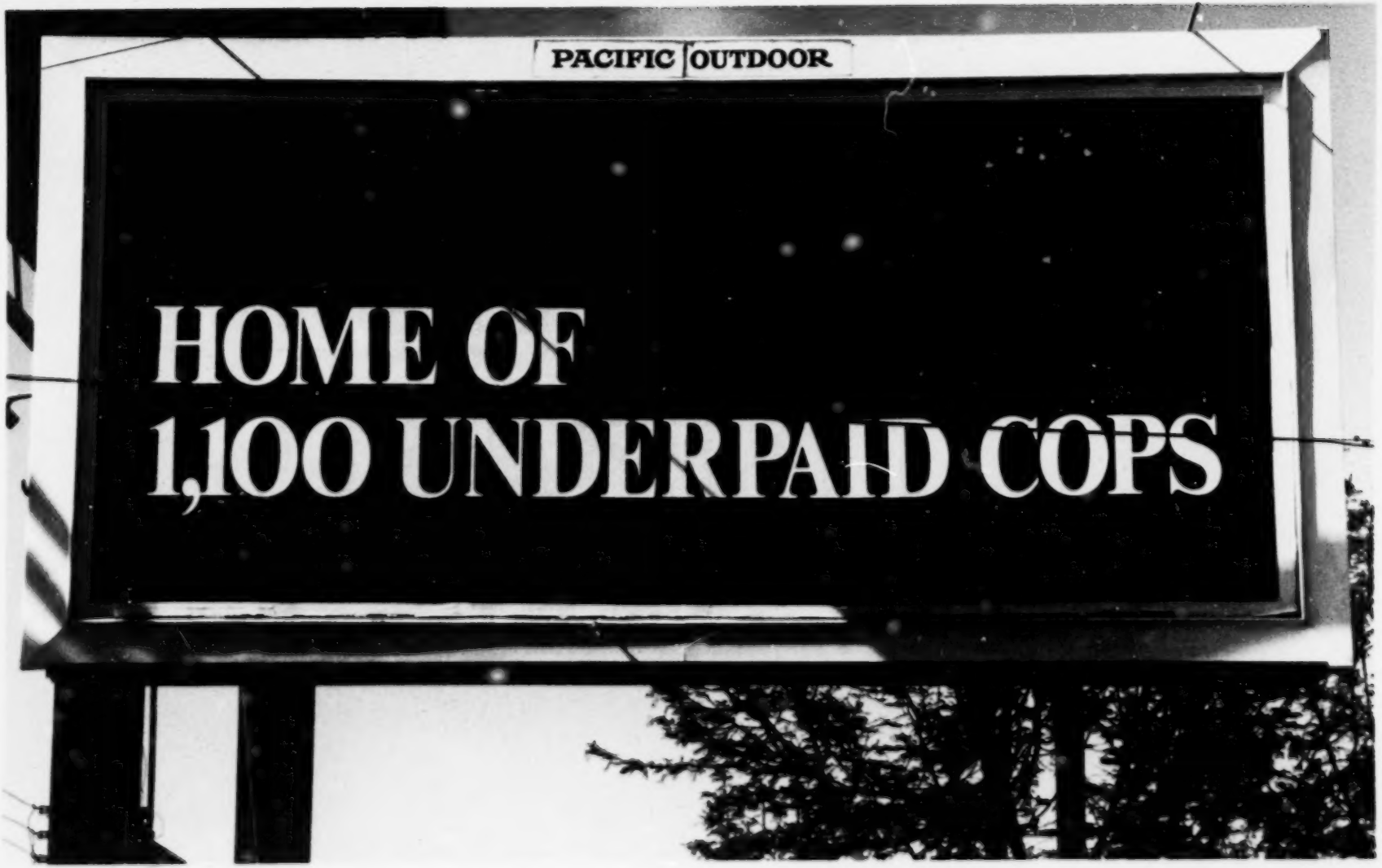
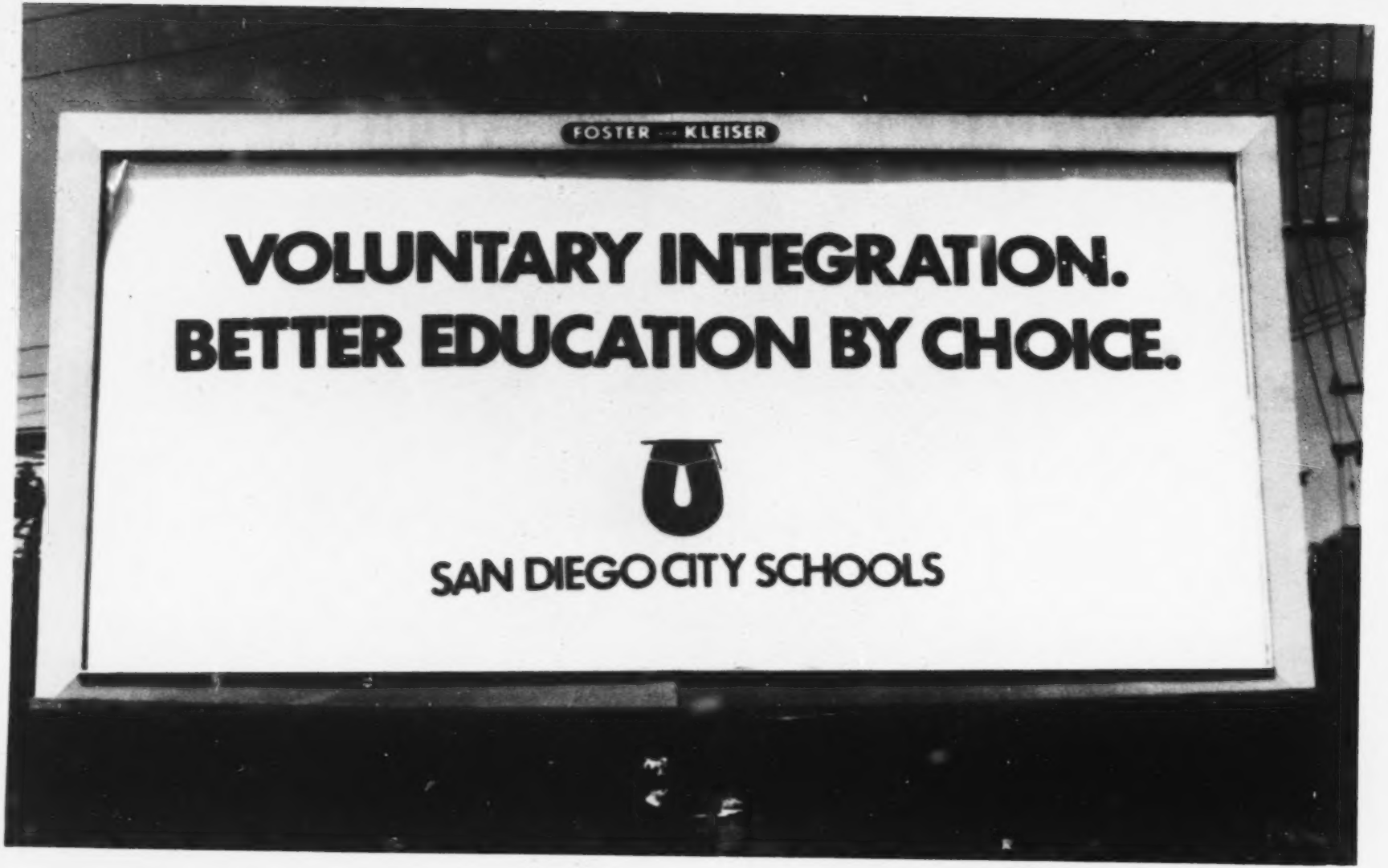
Attorneys for Defendant
City of San Diego

APPENDIX I

Photographs illustrating political, community service and public interest messages conveyed on outdoor advertising displays in and around San Diego.

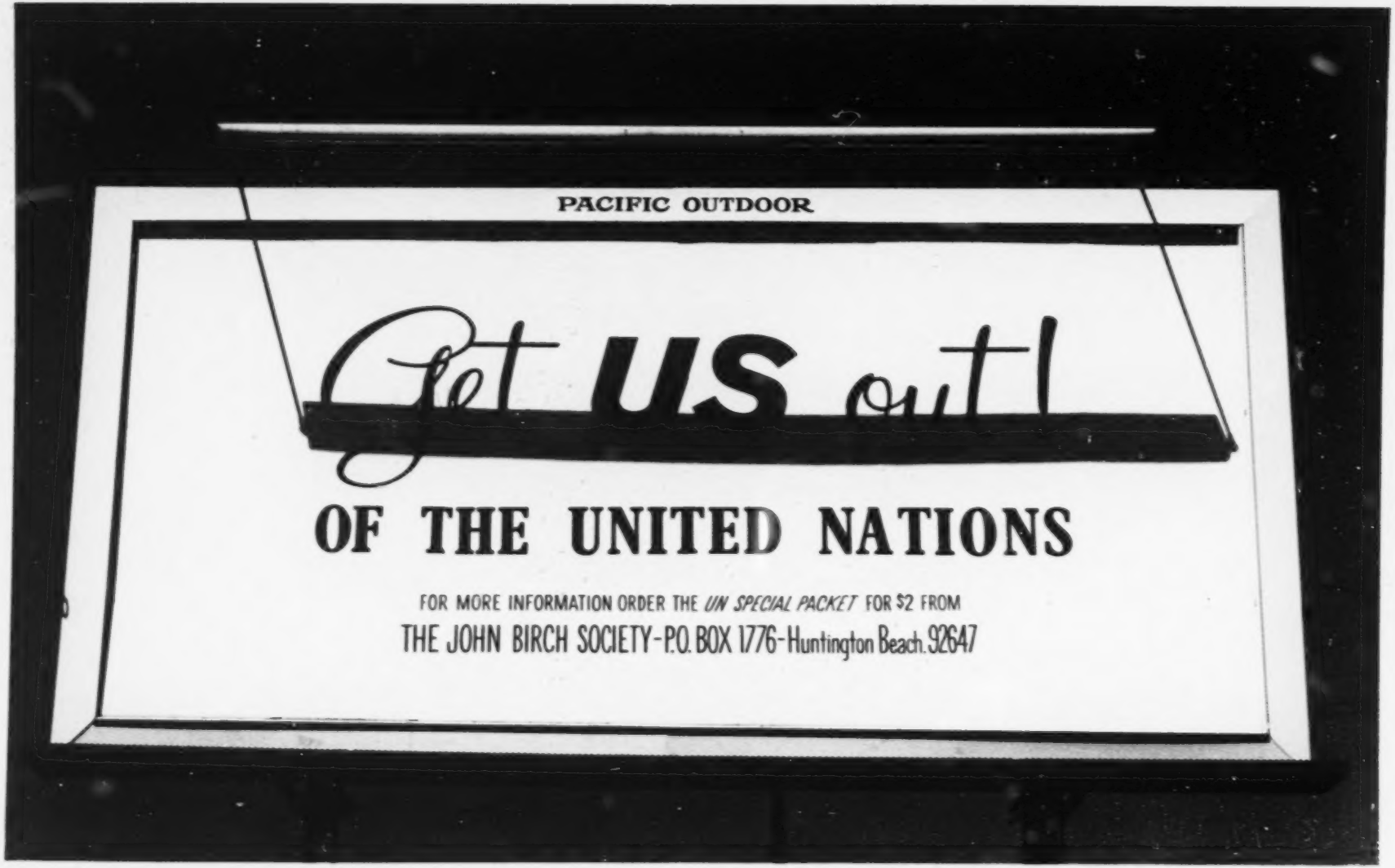

PACIFIC OUTDOOR
HOME OF
1,100 UNDERPAID COPS

FOSTER KLEISER
SUPPORT
SAN DIEGO'S
NO-GROWTH
POLICY
SPEND YOUR MONEY
IN
LOS ANGELES!
BOYCOTT SAN
DIEGO!
S. D. UNFAIR TO FIRE FIGHTERS • Sponsored by SAN DIEGO FIRE FIGHTERS


FOSTER — KLEISER
VOLUNTARY INTEGRATION.
BETTER EDUCATION BY CHOICE.
SAN DIEGO CITY SCHOOLS

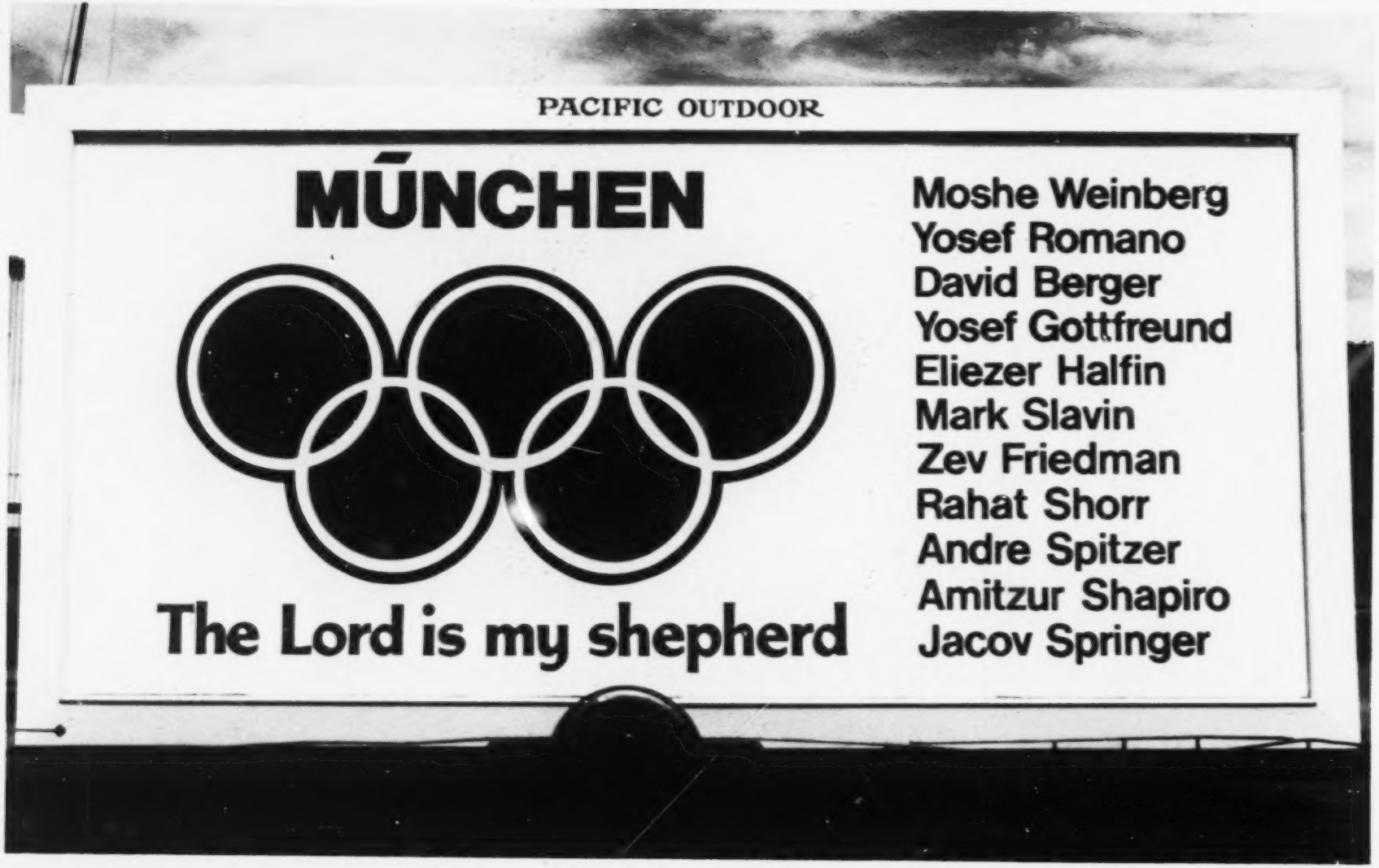
A Public Service of
san diego
county bar
association
call
Lawyer Referral Service
In the Yellow Pages under ATTORNEYS
FOSTER and KLEISER
BEKINS
STORAGE

FOSTER --- KLEISER
SUPPORT
AMERICA'S FIRST
ENVIRONMENT STRIKE
DON'T BUY SHELL!
OIL, CHEMICAL AND ATOMIC WORKERS INT'L. UNION, AFL-CIO


PACIFIC OUTDOOR
Get US out!
OF THE UNITED NATIONS
FOR MORE INFORMATION ORDER THE UN SPECIAL PACKET FOR $2 FROM
THE JOHN BIRCH SOCIETY-P.O. BOX 1776-Huntington Beach. 92647

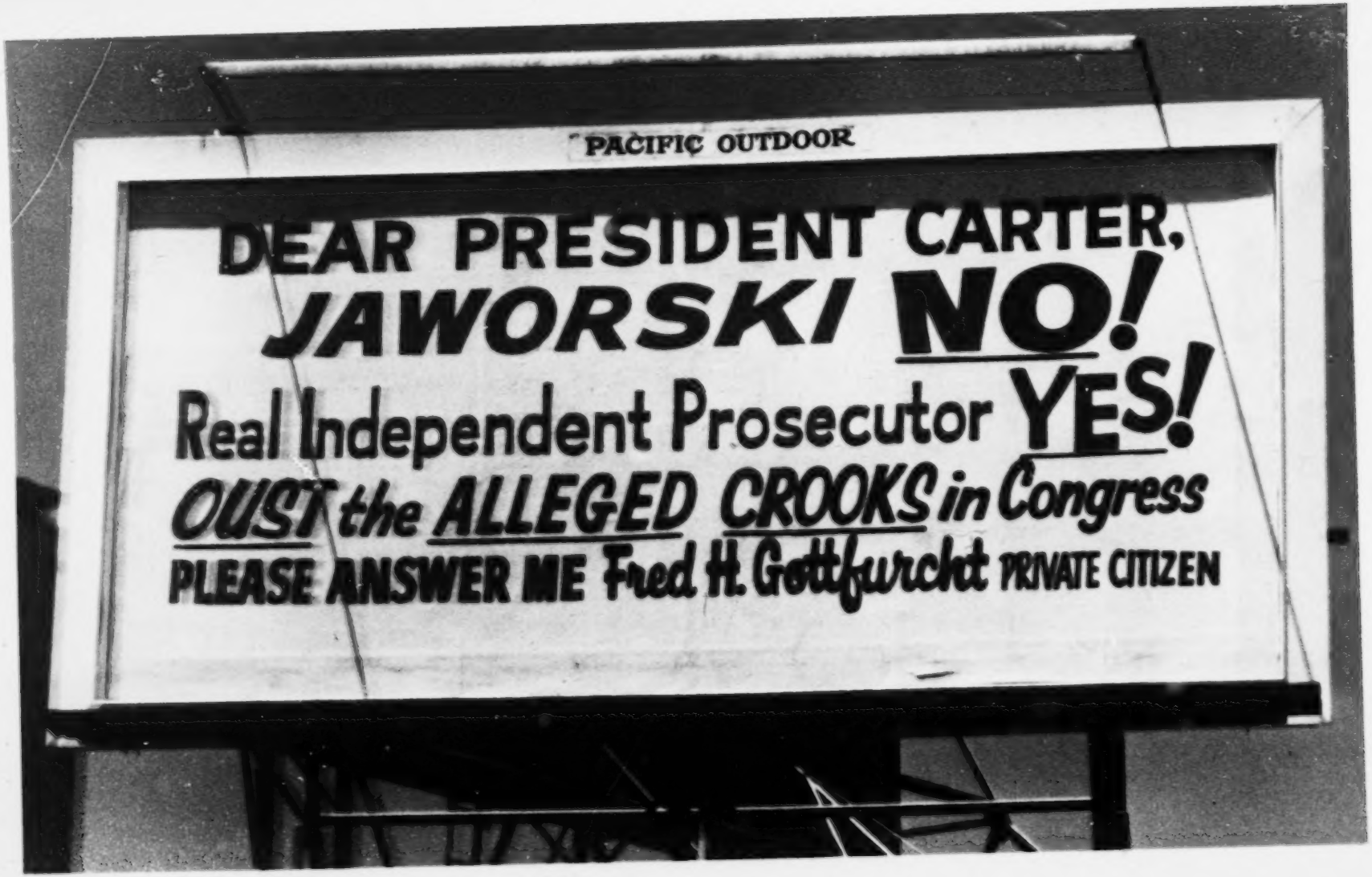
PACIFIC OUTDOOR
GET THEM HOME!
THE PRISONERS OF WAR IN SOUTH EAST ASIA

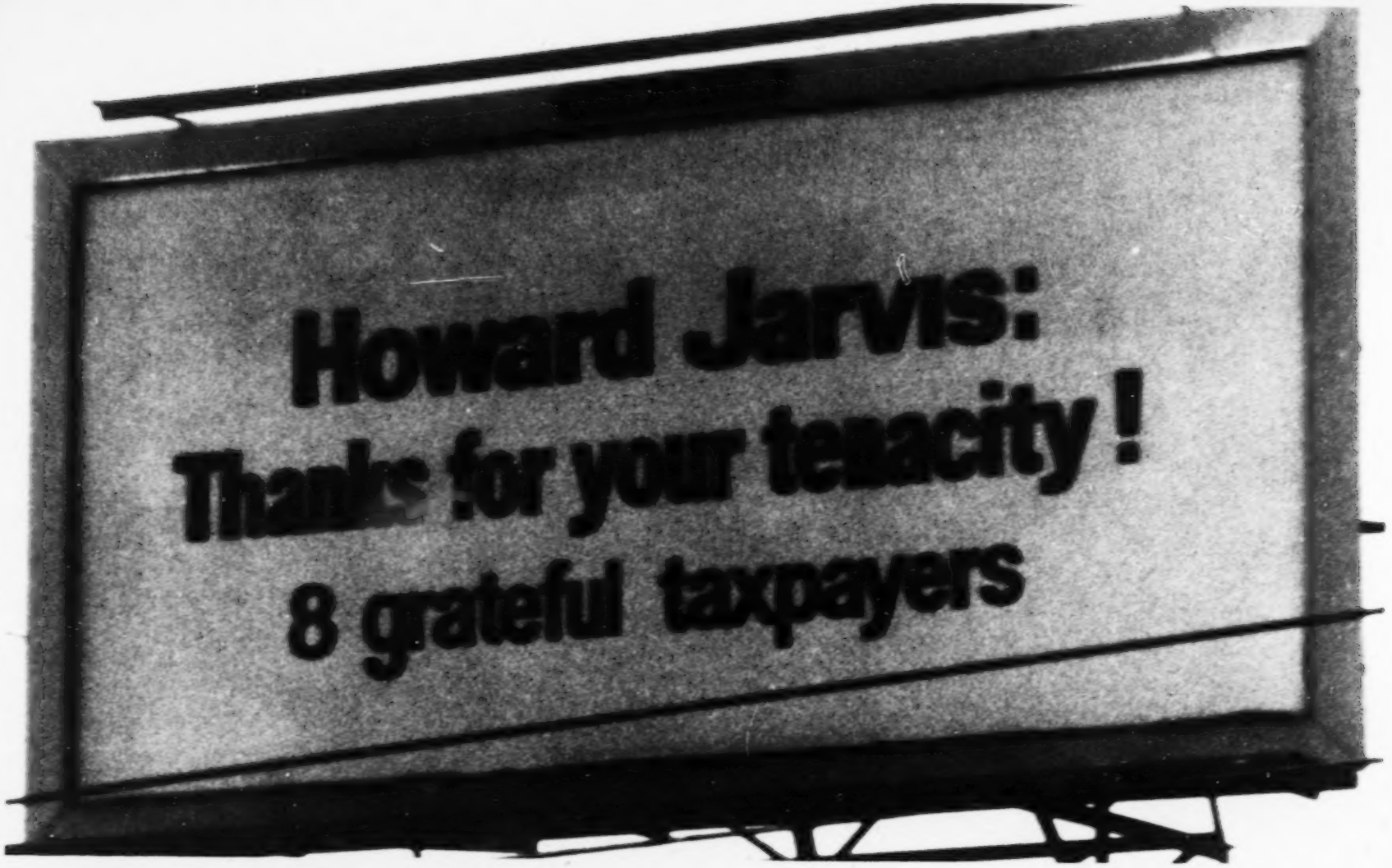
ELLER
THE NUCLEAR ARMS RACE
CAN MAKE THIS
THE LAST GENERATION
Urge Congress to stop it!
WOMEN FOR PEACE 848-3020

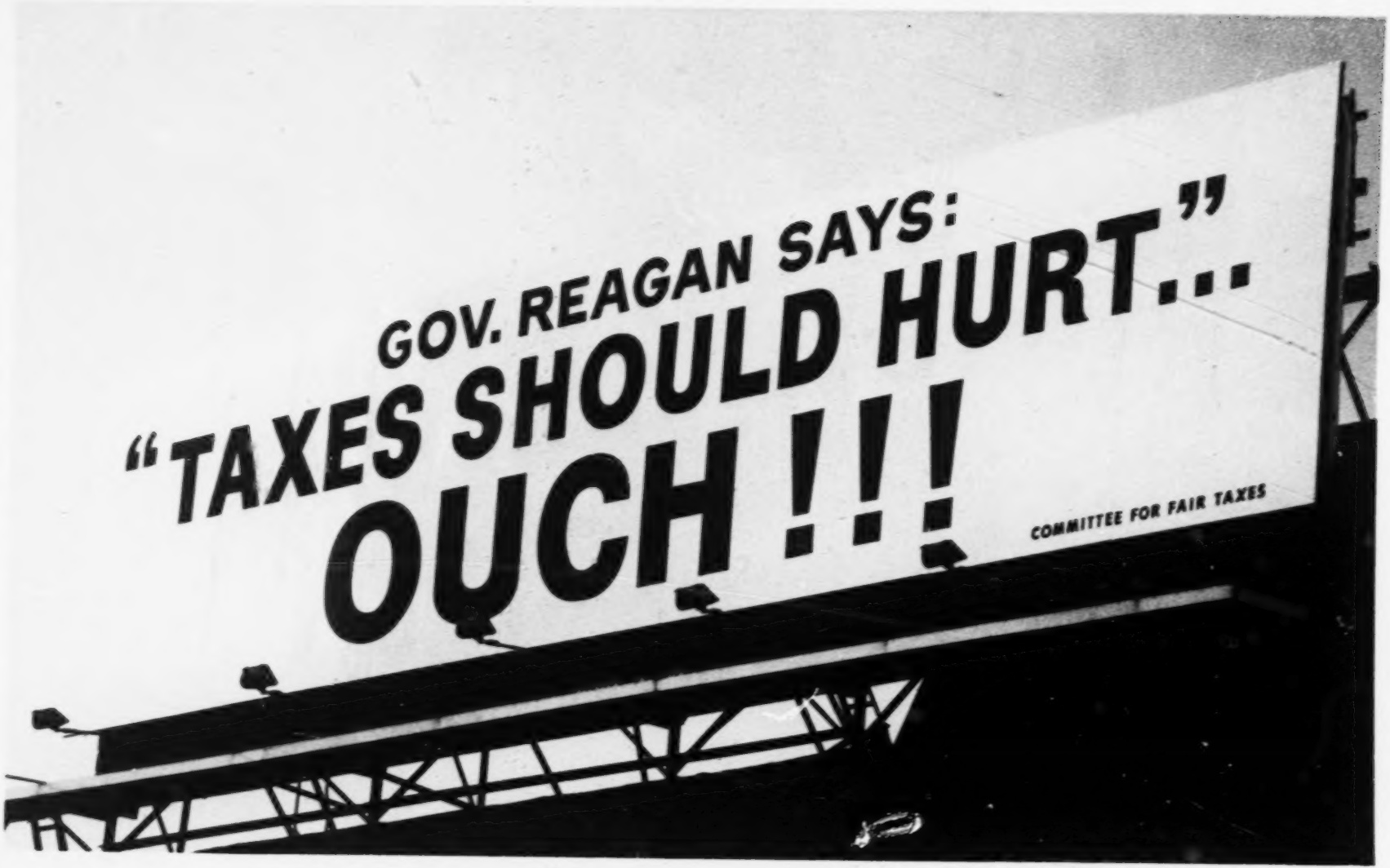

PACIFIC OUTDOOR
MÚNCHEN
The Lord is my shepherd
Moshe Weinberg
Yosef Romano
David Berger
Yosef Gottfreund
Eliezer Halfin
Mark Slavin
Zev Friedman
Rahat Shorr
Andre Spitzer
Amitzur Shapiro
Jacov Springer

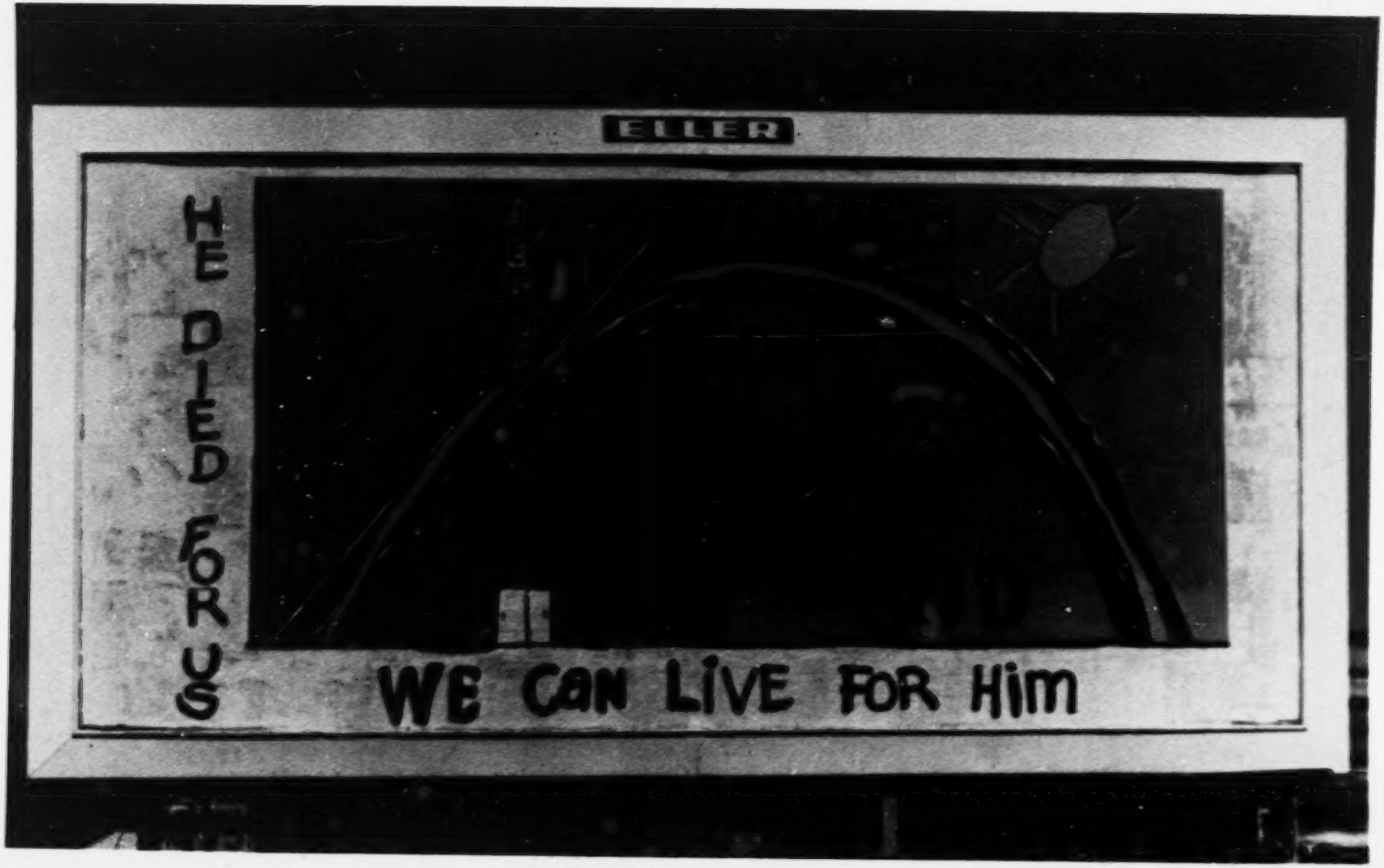
ELLER

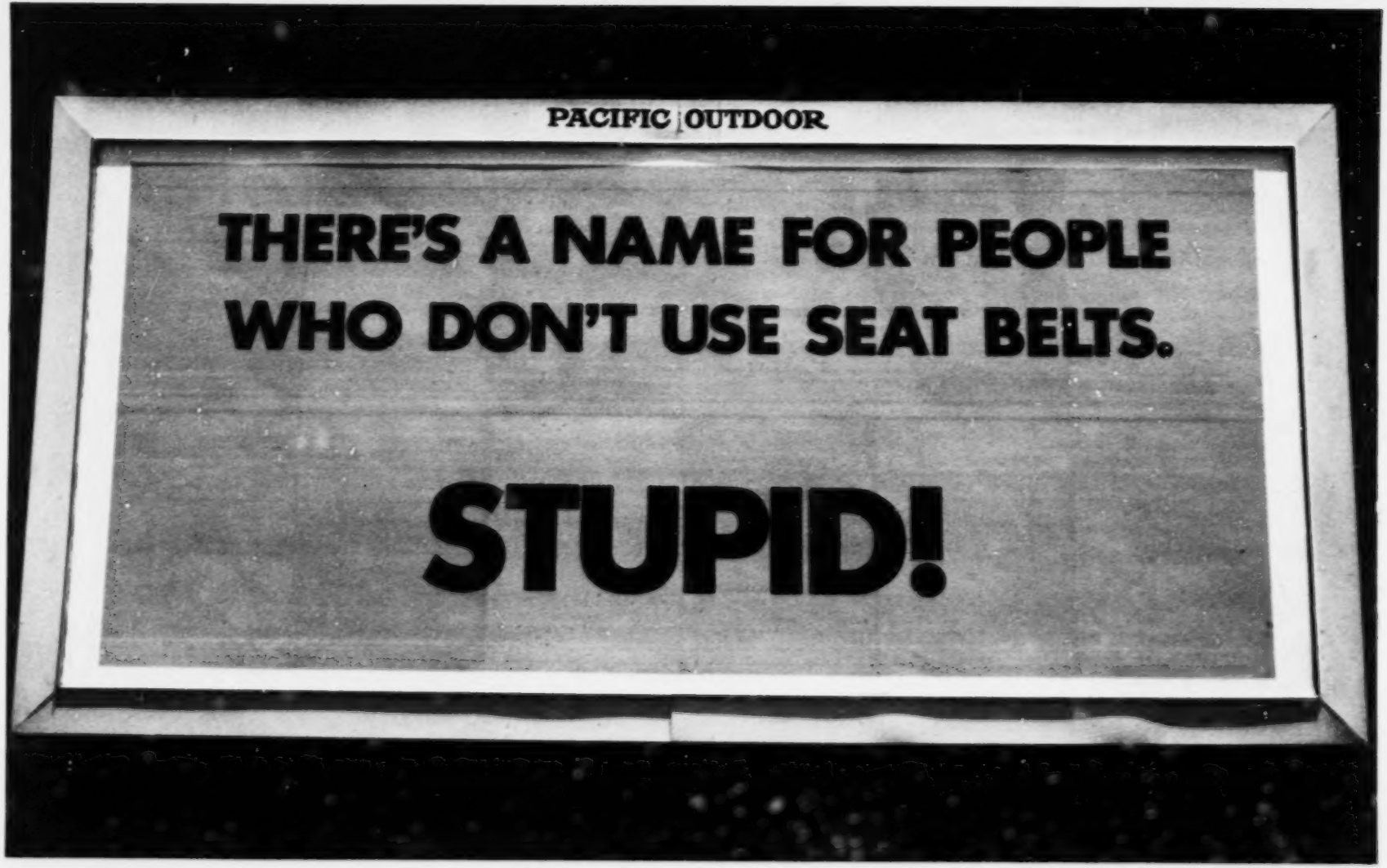
FREEDOM FOR CROATIA


PACIFIC OUTDOOR
DEAR PRESIDENT CARTER,
JAWORSKI NO!
Real Independent Prosecutor YES!
OUST the ALLEGED CROOKS in Congress
PLEASE ANSWER ME Fred H. Gottfurcht PRIVATE CITIZEN

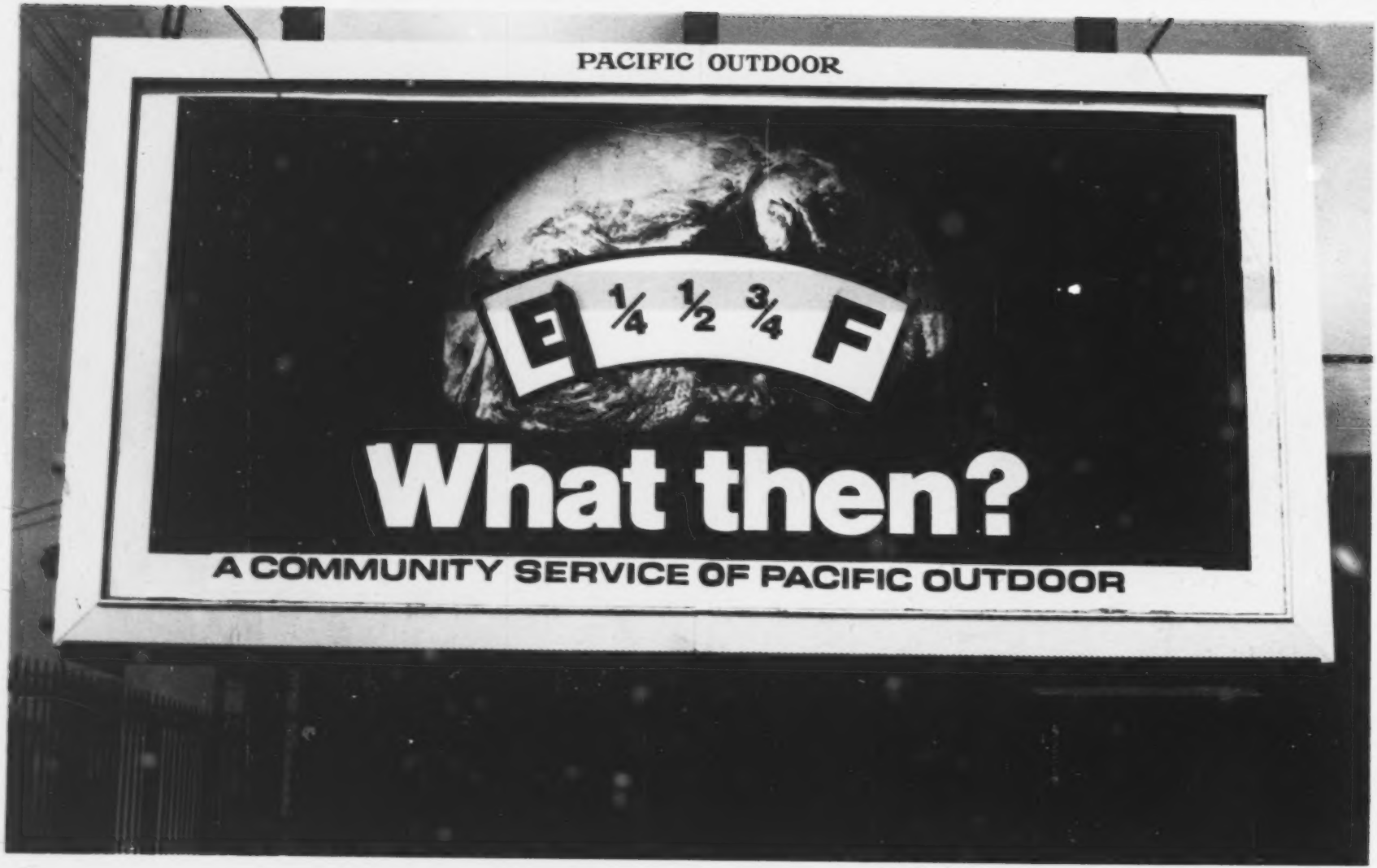

Howard Jarvis:
Thanks for your tenacity!
8 grateful taxpayers


GOV. REAGAN SAYS:
"TAXES SHOULD HURT..."
OUCH!!!
COMMITTEE FOR FAIR TAXES

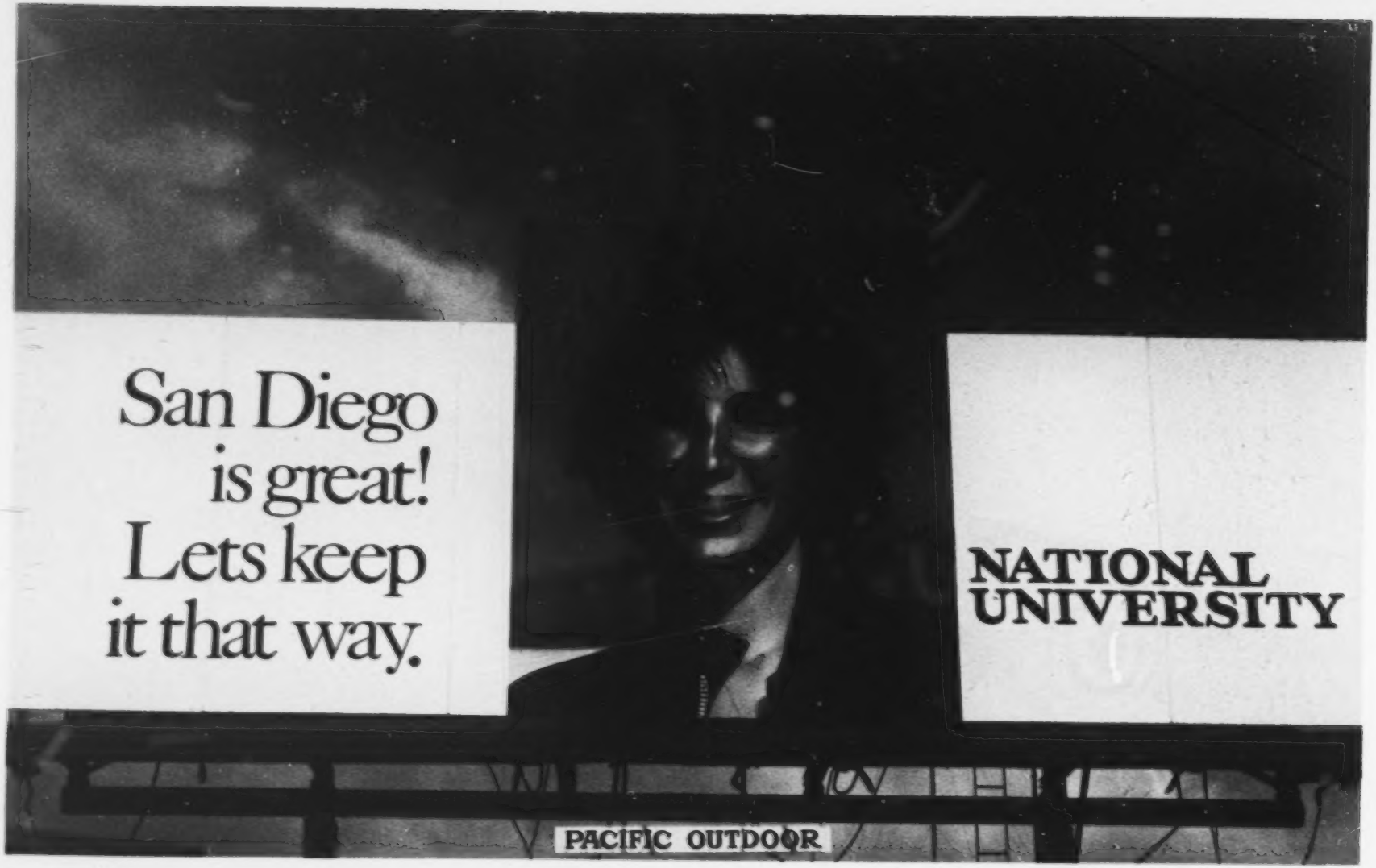

ELLER
HE DIED FOR US
WE CAN LIVE FOR HIM

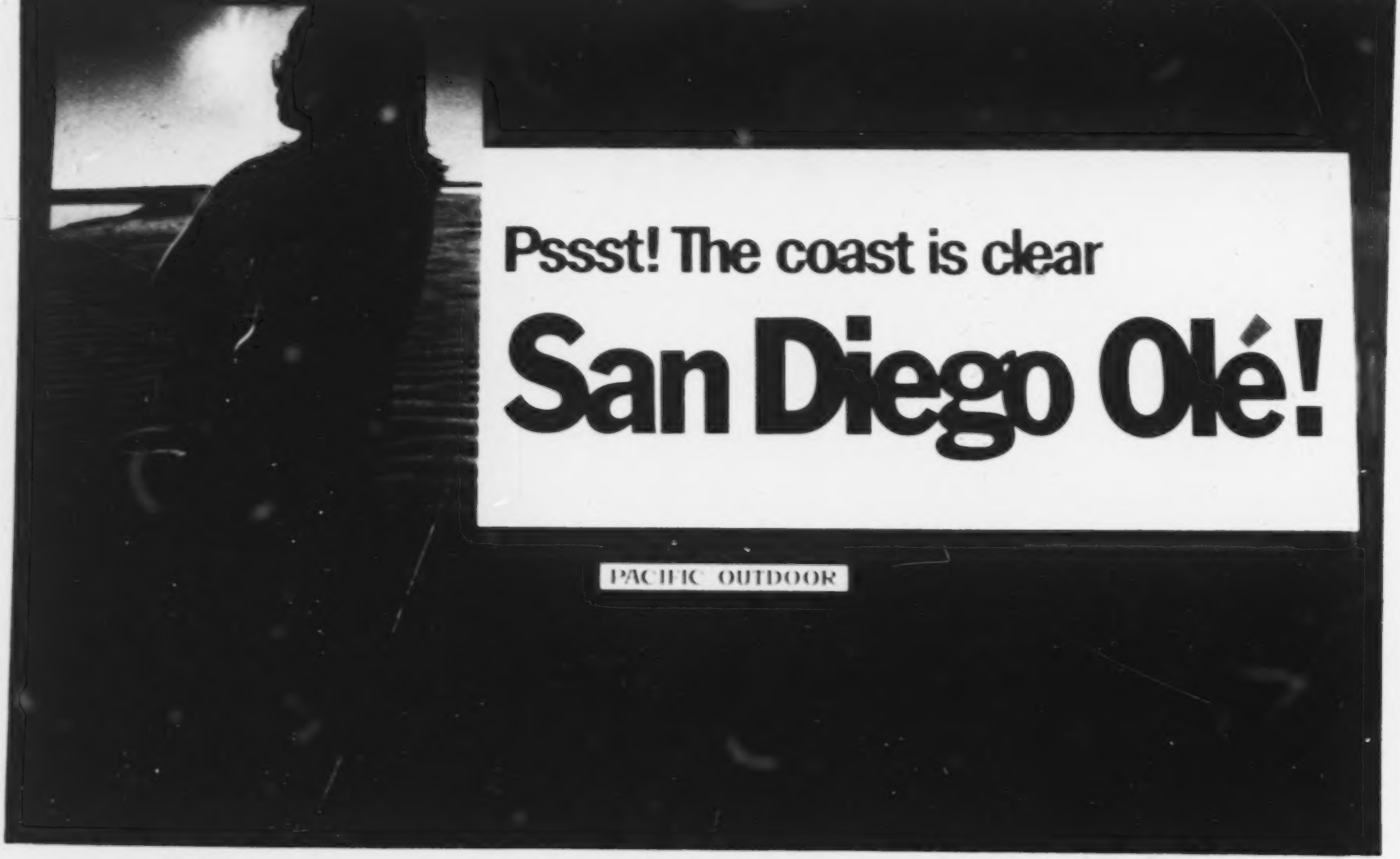

PACIFIC | OUTDOOR
THERE'S A NAME FOR PEOPLE
WHO DON'T USE SEAT BELTS.
STUPID!

55
MPH
Teaming
with you...
for SAFETY


PACIFIC OUTDOOR
E
¼ ½ ¾
F
What then?
A COMMUNITY SERVICE OF PACIFIC OUTDOOR

FOSTER and KLEISER
E 1/4 1/2 3/4 F
What then now?
A FOSTER and KLEISER PUBLIC SERVICE MESSAGE


San Diego
is great!
Lets keep
it that way.
NATIONAL
UNIVERSITY
PACIFIC OUTDOOR


Pssst! The coast is clear
San Diego Olé!
PACIFIC OUTDOOR